

No. 14432

(and consolidated cases Nos. 14432-14440
and Nos. 14442-14446)

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

DIX BOX CO. and BENJAMIN DIX, doing busi-
ness as DIX BOX CO., Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

JAN 7 1955

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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600 Federal Building,
Los Angeles 12, California.

For Appellees:

LILLIE & BRYANT,
WALTER M. CAMPBELL, JR.,
1117 Rowan Building,
458 South Spring Street,
Los Angeles 13, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil No. 15451-HW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIX BOX CO., a partnership, BENJAMIN DIX,
HYMAN DIX, MAX DIX and ROSE MIS-
TOFSKY, individually and as partners in DIX
BOX CO., Defendants.

COMPLAINT FOR DAMAGES

The United States of America brings this suit against the above named defendants and alleges:

I.

This is a civil action brought to recover damages for violations by defendants of a price stabilization regulation issued pursuant to the Defense Production Act of 1950, as amended (50 U.S.C. App. Sec. 2061, et seq.). Jurisdiction of this suit is vested in this Court by Section 706(b) of the Defense Production Act of 1950, as amended [50 U.S.C. App. Sec. 2156(b)], and also by Section 1345, Title 28, United States Code.

II.

Defendant Dix Box Co. is a partnership composed of defendants Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky. At all times herein mentioned defendants were and are now engaged in

the business of reconditioning [2] and selling used wooden agricultural containers, having their principal place of business at 1023 East 14th Street, Los Angeles, California, which is within the territorial limits of the jurisdiction of this Court.

III.

On April 29, 1952, acting pursuant to the Defense Production Act of 1950, Executive Order 10161 (15 F.R. 6105), and Economic Stabilization Agency General Order No. 2 (16 F.R. 738), the Director of Price Stabilization issued Ceiling Price Regulation 142 (17 F.R. 3822), which became effective on May 5, 1952 and continued in full force and effect from said date to and including February 16, 1953.

IV.

Ceiling Price Regulation 142 established dollars and cents ceiling prices for certain sales of used wooden agricultural containers, including those mentioned in paragraph V hereof. At all times herein mentioned:

(a) Section 2 of this Regulation specified dollars and cents ceiling prices for each of the various kinds of agricultural containers including those sold in the sales and deliveries mentioned in paragraph V hereof.

(b) Section 10(a) of this Regulation prohibited the sale of any used wooden agricultural container at a price in excess of the ceiling price established therefor.

V.

During the period beginning May 5, 1952 and continuing to and including January 31, 1953, defendants sold and delivered certain used wooden agricultural containers at prices totalling \$4,964.38 in excess of the ceiling prices established by Ceiling Price Regulation 142. Said sales and deliveries are identified in Schedule A, which is attached hereto and made a part hereof, and which sets forth the quantity of each type of container sold during said period, the unit price charged and received therefor, the unit ceiling price applicable thereto, and the amount of the overcharges received by defendants in said sales and deliveries.

VI.

Each of the purchasers of the containers sold and delivered in the [3] sales and deliveries identified in Schedule A purchased the same in the course of his trade or business. None of said sales or deliveries arose because defendants acted upon or in accordance with the written advice or instructions of the President of the United States, or any officer or employee authorized to act for him. None of said sales or deliveries arose out of the sale of any material or services to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

Wherefore, plaintiff prays for judgment against defendants, as follows:

1. For the sum of \$14,893.14, being treble the amount of the total overcharges made in the sales

and deliveries mentioned in paragraph V hereof;

2. For reasonable attorney's fees and costs of litigation as determined by the Court;

3. For its court costs incurred herein; and

4. For such other and further relief as the Court may deem just and equitable.

WALTER S. BINNS,

United States Attorney

CLYDE C. DOWNING,

Assistant U. S. Attorney, Chief of
Civil Division

/s/ By ALDEN F. HOUCK,

Special Assistant to the United
States Attorney

[4]

SCHEDULE "A"

Type of Container Sold	No. of contain- ers sold during period	Selling price per container	Ceiling price per con- tainer**	Overcharge	
				Per con- tainer	Total
Tray	560	\$0.08	\$0.07	\$0.01	\$ 5.60
Tray-Sanded	1,290	.10	.09	.01	12.90
Tray-Sanded	12,960	.12	.09	.03	388.80
Flat-Sanded	11,460	.16	.15	.01	114.60
Lug	500	.14	.12	.02	10.00
Lug-Sanded	5,036	.16	.15	.01	50.36
Lug-Sanded	3,656	.165	.15	.015	54.84
Lug-Sanded	40,554	.17	.15	.02	811.08
Lug-Sanded- Labeled*	548	.16	.15	.01	5.48
Lug-Sanded- Labeled*	4,956	.17	.15	.02	99.12
Lug-Sanded	6,248	.18	.15	0.3	187.44

Type of Container Sold	No. of contain- ers sold during period	Selling price per container	Ceiling price per con- tainer**	Per con- tainer	Overcharge Total
Lug-Sanded- Labeled*	400	.18	.15	.03	12.00
Lug-Sanded	10,652	.20	.15	.05	532.60
Celery	760	.16	.15	.01	7.60
Celery	315	.17	.15	.02	6.30
Celery	16,703	.18	.15	.03	501.09
Celery	9,941	.20	.15	.05	497.05
Lettuce	133,220	.25	.24	.01	1,332.20
Lettuce-Labeled*	9,078	.25	.24	.01	90.78
Wirebound	21,396	.15	.14	.01	213.96
Basket	1,529	.12	.10	.02	30.58

Total Overcharges \$4,964.38

* These containers were sold "Labeled"; accordingly selling prices were adjusted to reflect a credit of 1c per container for this service.

** All containers were considered to be "Dealer Grade 1".

[Endorsed]: Filed May 1, 1953.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants, Dix Box Co., a partnership, Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky, and admit, deny and allege as follows:

I.

In response to Paragraphs I, III, IV, V and VI,

defendants generally and specifically deny each and all of the said paragraphs.

II.

In further response to plaintiff's complaint, defendants admit, deny and allege:

(a) In further response to Paragraph IV, defendants admit that the Regulation provides what said paragraph alleges.

(b) In further response to Paragraph V defendants deny an overcharge in the sum as set forth in said paragraph, the sum of \$4,964.38, any other sum, or at all.

(c) In further response to Paragraph V, defendants at this [6] time do not have information or belief sufficient to enable them to answer the allegations contained in said paragraph concerning the sales and deliveries identified in Schedule A, and based upon such lack of information and belief, deny said sales as set forth in said Schedule, any other sales or at all, except as defendants may hereinafter admit. Defendants do admit that sales and deliveries of boxes, to wit, used wooden agricultural containers, were made during the period beginning May 5, 1952, to and including January 31, 1953.

For a Further, Separate and Affirmative Defense, Defendants Allege:

I.

Defendants deny any overcharges in any sum whatsoever. Without conceding any overcharges or violations of any type, defendants allege that if

any violations did in fact occur, same occurred after defendants exercised good faith and reasonable and practical precautions to avoid said violations and the occurrence of same, and that said violations were not the result of any wilful misconduct on the part of these defendants.

Defendants Demand a Trial by Jury of All Issues Involved Herein Properly Triable by and Before a Jury.

Wherefore, defendants pray that plaintiff take nothing by its complaint; that defendants have judgment herein, and for such other and further relief as to the Court may seem just and proper.

/s/ DAVID S. SMITH,

Attorney for Defendants [7]

Duly Verified.

Affidavit of Service by Mail attached. [8]

[Endorsed]: Filed June 4, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff, the United States of America, requests defendants, Dix Box Co. and Benjamin Dix, doing business as Dix Box Co., within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

I.

That each of the following statements is true:

(a) That the purchasers of the containers specified in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, purchased the same in the course of their trade or business.

(b) That the purchasers of the containers specified in columns one, two, and three of Schedule "A" attached to the Complaint filed herein were engaged in a business or occupation or profession in which used wooden agricultural containers were used or disposed of.

(c) That none of the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, has [9] within thirty days from the date of the sale of said containers brought an action on account of an overcharge under § 2109 (c) U.S.C.

(d) That defendants do not know of any action brought by the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, which action was brought within thirty days from the date of the sale of said containers on account of an overcharge under § 2109 (c) U.S.C.

(e) That at no time have defendants received any written advice from the President of the United States or from any officer or employee authorized to act for him, advising or instructing said defendants not to comply with the provisions of Ceiling Price

Regulation 142 referred to in the Complaint filed herein.

(f) That defendants do not know nor have they known of the existence of any written advice or instructions of the President of the United States or of any officer or employee authorized to act for him advising or instructing said defendants not to comply with the provisions of Ceiling Price Regulation 142 referred to in the Complaint filed herein.

(g) That none of the sales and deliveries referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, was made to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief,

Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

Attorneys for Plaintiff [10]

Affidavit of Service by Mail attached. [11]

[Endorsed]: Filed January 29, 1954.

In the United States District Court, Southern District of California, Central Division

United States of America, Plaintiff,

vs.

Dix Box Co. and Benjamin Dix doing business as
Dix Box Co., Defendant—No. 15451.

Elsie Ann Hall, Defendant—No. 15453.

Joe Agopian, Defendant—No. 15454.

Tom V. Potigium, Defendant—No. 15455. [15]

Mack Chirpin, Defendant—No. 15452.

Dave Savetnick, Defendant—No. 15456.

Isadore Ginsberg, Defendant—No. 15457.

Harry Simonian, Defendant—No. 15458.

James O. Fugitani, Defendant—No. 15459.

Walter S. Abe, Defendant—No. 15460. [16]

H. M. Hernandez & Sons, etc., Defendants—No.
15462.

Standard Crate Co., a partnership, et al., Defendants—No. 15463.

Acme Crate Co., a partnership, etc., Defendants—
No. 15464.

Kazuo Yano, Defendant—No. 15471.

ANSWER TO REQUEST FOR ADMISSION UNDER RULE 36

Come now the defendants in the above-entitled cases and in answer to the request by the United States of America for Admission Under Rule 36 object to the requests enumerated (a) (b) and (c) on the grounds that said matters are not within the knowledge of these defendants, are matters which go directly to the jurisdiction of this Court and therefore cannot be waived by stipulation, and are matters which are peculiarly within the knowledge

[17] of the Plaintiff and should have been alleged by the plaintiff herein.

Dated: February 5, 1954.

LILLIE & BRYANT, and
WALTER M. CAMPBELL, JR.,
/s/ By WALTER M. CAMPBELL, JR.,
Attorneys for Defendants [18]

Affidavit of Service by Mail attached. [19]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause No. 15451.]

STIPULATION AS TO REMAINING ISSUES

Whereas, in open Court at a pre-trial conference held on January 15, 1954, the Court directed the parties hereto to file a stipulation as to the remaining issues in the above entitled action,

It Is Hereby Stipulated by and between the above-named parties, through their respective counsel, that:

I. Facts Which Require No Proof

(a) From May 5, 1952, to January 31, 1953, inclusive, defendants were "dealers" in used wooden agricultural containers and were engaged in the business of reconditioning and selling said containers.

(b) From May 5, 1952, to January 31, 1953, inclusive, defendants sold and delivered the types and respective numbers of used wooden agricultural containers as set forth in columns one and two of

Schedule "A" attached to the complaint filed herein, at the respective selling prices per container as set [20] forth in column three of said Schedule.

(c) From May 5, 1952, to January 31, 1953, inclusive, defendants sold the containers referred to in columns one, two and three of Schedule "A" attached to the complaint filed herein in wholesale lots.

(d) Defendants do not know of any action brought by the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the complaint filed herein, which action was brought within thirty days from the date of the sale of said containers on account of an overcharge under 50 USCA 2109(c).

(e) At no time have defendants received any written advice from the President of the United States or from any officer or employee authorized to act for him, advising or instructing said defendants not to comply with the provisions of Ceiling Price Regulation 142 referred to in the complaint filed herein.

(f) None of the sales and deliveries referred to in columns one, two, and three of Schedule "A" attached to the complaint filed herein, was made to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

(g) Order No. L-117, dated June 28, 1951, issued by the Director of Price Stabilization, specified dollars and cents ceiling prices for defendants for some of the types of used wooden agricultural containers

enumerated in Schedule "A" of the complaint filed herein.

(h) Ceiling Price Regulation 142, dated April 29, 1952 (hereafter referred to as CPR 142), issued by the Director of Price Stabilization, specified dollars and cents ceiling prices for all of the types of wooden agricultural containers enumerated in Schedule "A" of the complaint filed herein.

(i) With few exceptions, the prices at which defendants sold used wooden agricultural containers from May 5, 1952, to January 31, 1953, did not exceed the prices specified in Order No. L-117, as to those types of containers for which said Order specified dollars and cents prices. Defendants contend there were no exceptions. [21]

(j) On or about May 15, 1952, a meeting or meetings were held between representatives of the Los Angeles Box and Crate Dealers' Association and officials of the Office of Price Stabilization, Los Angeles, California.

II. Defendants' Contentions

(a) During the period of the alleged violation defendants' ceiling prices for the sale of used wooden agricultural containers were governed by the provisions of Order No. L-117.

(b) CPR 142 is invalid.

(c) At the meeting or meetings held between representatives of the Los Angeles Box and Crate Dealers' Association and officials of the Office of Price Stabilization, Los Angeles, California, the latter officials either expressly or tacitly authorized

defendants to continue selling used wooden agricultural containers according to the provisions of Order No. L-117 and also promised to get CPR 142 amended.

(d) The described conduct of these officials operates to estop the United States from enforcing against defendants the provisions of CPR 142.

III. Plaintiff's Contentions

(a) That defendants' ceiling prices for the sale of used wooden agricultural containers during the period of the violations were not governed by the provisions of Order No. L-117; but were governed instead by the provisions of CPR 142; for the reason that CPR 142 superseded Order No. L-117.

(b) That CPR 142 was valid, and in full force and effect during this period.

(c) That even if a question as to the validity of CPR 142 existed, this Court does not have jurisdiction to determine the question.

(d) That officials of the Office of Price Stabilization, Los Angeles, California, did not make the representations as alleged in defendants' contention II (d) above. [22]

(e) That even if these officials made the representations as alleged by defendants, such conduct would not estop or bind the United States, nor prevent plaintiff from enforcing against defendants the provisions of CPR 142.

IV. Remaining Issues

(a) Whether defendants' ceiling prices were governed by CPR 142 or Order No. L-117.

(b) Whether officials of the Office of Price Stabilization made the representations as alleged by defendants.

(c) Whether these representations if made as alleged by defendants constitute a defense to this action.

(d) Whether this Court has jurisdiction to consider the validity of CPR 142.

(e) If this Court has jurisdiction to consider the validity of CPR 142, whether this regulation is valid.

Dated: February 8, 1954.

LILLIE & BRYANT, and

WALTER M. CAMPBELL, JR.,

/s/ By WALTER M. CAMPBELL, JR.,

Attorneys for Defendants

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ By JAMES R. DOOLEY,

Attorneys for Plaintiff

It Is So Ordered this 8th day of February, 1954.

/s/ HARRY C. WESTOVER,

Judge, U. S. District Court [23]

[Endorsed]: Filed February 8, 1954.

In the United States District Court, Southern District of California, Central Division

[Title of Causes 15451-60, 15462-64 and 15471.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled causes came on regularly for trial on the 11th and 12th days of February, 1954, before the Honorable Harry C. Westover, Judge presiding sitting without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant U. S. Attorney and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley appearing for the plaintiff, and Lillie & [28] Bryant and Walter M. Campbell, Jr. by Walter M. Campbell, Jr. appearing for the defendants, and said causes having been consolidated for trial, and evidence both oral and documentary having been introduced, together with stipulations then and theretofore entered into by the parties through their respective counsel, and the causes having been submitted for decision on the 12 day of February, 1954, and being fully advised in the premises the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

That the defendants, and each of them, were at all times mentioned in the respective complaints herein, and for a number of years prior thereto,

engaged as dealers in the business of buying, reconditioning and selling used wooden agricultural containers, having their principal places of business in or about the City of Los Angeles, State of California, and within the territorial limits of the jurisdiction of this Court.

II.

That under and by virtue of the authority vested in the President of the United States by the Defense Production Act of 1950, which authority was theretofore duly delegated by him to the Director of Price Stabilization, ceiling prices to be obtained by the dealers in the resale of used wooden agricultural containers, including the defendants, was fixed at the highest prices obtained by them during the period December 20, 1950, to January 19, 1951, as provided by the General Ceiling Price Regulation.

III.

That because of the seasonal variations of the fruit and vegetable business ceiling prices, the said prices which became effective under the General Ceiling Price Regulation as referred to herein, were established during a period of few sales and proved to be inadequate for a large segment of the used container industry, and particularly with respect to the prices obtained for the major items sold by the defendants herein.

IV.

That by reason of the inequities referred to in Paragraph III hereof, [29] the defendants, to-

gether with others in the similar business in the vicinity of the City of Los Angeles, State of California, within the jurisdiction of this Court, engaged attorneys and filed protests with the Office of Price Stabilization at Washington, D. C.; that as a result thereof the Office of Price Stabilization issued its certain Order known as Order L-117 heretofore admitted in evidence as defendants' Exhibit "A" herein, establishing dollar and cent maximum ceiling prices for those certain types of containers which are the principal commodities sold by the defendants herein. That from and after the issuance of said Order L-117 and up to and including the 31 day of January, 1953, which period includes the time that all of the acts complained of as having been performed by the defendants herein in the various complaints enumerated in the heading hereof, the defendants, and each of them, resold used wooden agricultural containers at a price not to exceed the ceiling prices referred to in said Order L-117 or in excess of the prices set by General Ceiling Price Regulation as to those commodities not affected by Order L-117.

V.

That on or about April 29, 1952, the Office of Price Stabilization over the signature of the Director of Price Stabilization purported to promulgate that certain Ceiling Price Regulation No. 142, a copy of which has been admitted in evidence and marked Plaintiff's Exhibit "1". That prior to the promulgation of said Ceiling Price Regulation No.

142 and prior to the dollar and cents ceiling prices for retailers and dealers as set forth therein, the said Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the defendants herein or any of their representatives, or with other dealers in the used wooden agricultural container business. That the defendants herein represent between 90% and 95% of the volume of business performed in the used Wooden Agricultural container business in the area adjacent to Los Angeles and San Diego, California, which is the territory purportedly embraced by Ceiling Price Regulation Number 142. [30]

VI.

That immediately after learning of purported Ceiling Price Regulation Number 142, the defendants herein, through their duly appointed representatives, held meetings with the duly authorized representatives of the Office of Price Stabilization at Los Angeles, California, such meetings first being held in the early part of May, 1952, and continuing from time to time until the 20 day of January, 1953, at which said latter date the Office of Price Stabilization in Los Angeles was disbanded and all ceiling prices removed so far as the used wooden agricultural container industry was concerned. That at said meetings, and each of them, it was the expressed agreement of both the representatives of the Industry and those of the Office of Price Stabilization that the dollar and cents prices as set forth in purported Ceiling Price Regulation No. 142 did not

in fact establish dealers' ceiling prices at a level approximately 18% above the projected general ceiling price regulation base period price level but did in fact lower the price to be received by dealers in many instances and raised the prices which the dealer was to pay to the retailer so as to lower the margin of gross profit to the dealer to the extent that if he were to follow such purported ceiling Price Regulation 142 he would in fact be operating at a net loss. That at said meetings the defendants were advised that while helpful it would not be necessary for them to engage attorneys and make formal protests to Washington which would necessarily consume several months of elapsed time in that the Los Angeles office of the Office of Price Stabilization would forthwith make the necessary economical investigations and recommendations to Washington that Ceiling Price Regulation No. 142 be altered or amended to provide adequate dealer and retailer ceiling prices. That the defendants herein thereupon stated that they would and thereafter did continue to comply with the ceiling prices as established by the said Order L-117 and the General Ceiling Prices Regulation. That said prices as utilized by the defendants herein were open and notorious and known at all times to the said officials of the Office of Price Stabilization who did not object thereto. That in so conducting [31] their business the defendants, and each of them, did so in reliance and belief that they were fully and adequately complying with the law and regulations applicable to such sales.

Conclusions of Law

I.

That Ceiling Price Regulation Number 142 is void and of no force and effect whatsoever by reason of the fact that the said regulation is arbitrary and that no effort was made by the Office of Price Stabilization to comply with the provisions of Title 50 U.S.C. Appendix, Section 2104 in advising or consulting with the members of the Industry with respect thereto.

II.

That the President of the United States and those to whom he has delegated authority are estopped from enforcing the provisions of purported Ceiling Price Regulation 142 by reason of the conduct and promises, expressed and implied, by said officials as aforesaid.

Dated: February 26th, 1954.

/s/ HARRY C. WESTOVER,

Judge of the U.S. District Court [32]

Affidavit of Service by Mail attached. [33]

[Endorsed]: Filed February 26, 1954.

In the United States District Court, Southern District of California, Central Division

Civil No. 15451-HW

UNITED STATES OF AMERICA, Plaintiff,

vs.

DIX BOX CO. and BENJAMIN DIX, doing business as DIX BOX CO., Defendants,

JUDGMENT

The above-entitled cause come on regularly for trial on the 11th and 12th days of February, 1954, before the Honorable Harry C. Westover, Judge presiding sitting without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant U. S. Attorney and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley appearing for the plaintiff, and Lillie & Bryant and Walter M. Campbell, Jr. by Walter M. Campbell, Jr. appearing for the defendants, and evidence both oral and documentary having been introduced, together with stipulations then and theretofore entered into by the parties through their respective counsel, and the cause having been submitted for decision, and the Court having heretofore made and caused to be filed herein its Findings of Fact and Conclusions of Law and being fully advised:

Wherefore, by reason of the law and the Findings of Fact aforesaid, it is Ordered, Adjudged, and Decreed that the plaintiff do have and recover nothing from the defendants and that the defend-

ants be allowed their [34] costs and disbursements incurred in said action amounting to the sum of \$.

Dated: February 26th, 1954.

/s/ HARRY C. WESTOVER,
Judge of U. S. District Court [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Judgment Docketed and Entered March 1, 1954.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause No. 15451.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 1, 1954.

Dated: April 28, 1954.

LAUGHLIN E. WATERS,
United States Attorney
MAX F. DEUTZ,
Assistant U. S. Attorney, Chief,
Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney
Attorneys for Plaintiff [37]

Affidavit of Service by Mail attached. [38]

[Endorsed]: Filed April 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Complaint; Answer; Motion to Dismiss and for Judgment on the Pleadings; Request for Admissions Under Rule 36; Answer to Request for Admissions Under Rule 36; Stipulation as to Remaining Issues; Minutes of the Court for February 11 and 12, 1954; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal which, together with Reporter's Transcript of Proceedings on February 11 and 12, 1954, and original exhibits, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19 day of July, A. D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court, Southern District of California, Central Division

[Title of Causes 15451-60, 15462-64 and 15471.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, February 11, 1954

Honorable Harry C. Westover, Judge presiding. [1*]

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney; by James R. Dooley, Assistant United States Attorney. For the Defendants: Lillie & Bryant, by Walter M. Campbell, Jr., Esq., 458 South Spring Street, Los Angeles, California. [2]

The Clerk: No. 1, 15451-HW Civil, United States vs. Dix Box Company, et al.

Mr. Campbell: Ready for the defendant.

Mr. Dooley: Ready for the Plaintiff.

The Clerk: No. 2, 15452-HW Civil, United States vs. Mack Chirpin.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 3, 15453-HW Civil, United States vs. Elsie Ann Hall.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Clerk: No. 4, 15454-HW Civil, United States
vs. Joe Agopian.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 5, 15455-HW Civil, United States
vs. Tom V. Potigium.

Mr. Dooley: Ready.

Mr. Campbell: Ready.

The Clerk: No. 6, 15456-HW Civil, United States
vs. Dave Savetnick.

Mr. Campbell: Ready. [4]

Mr. Dooley: Ready.

The Clerk: No. 7, 15457-HW Civil, United States
vs. Isadore Ginsberg.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 8, 15458-HW Civil, United States
vs. Harry Simonian.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 9, 15459-HW Civil, United States
vs. James O. Fugitani.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 10, 15460-HW Civil, United States
vs. Walter S. Abe.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 11, 15462-HW Civil, United States
vs. H. M. Hernandez & Sons, et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 12, 15463-HW Civil, United States vs. Standard Crate Co., et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready. [5]

The Clerk: No. 13, 15464-HW Civil, United States vs. Acme Crate Co., et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 14, 15471-HW Civil, United States vs. Kazuo Yano.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

Mr. Campbell: May the cases be consolidated, your Honor?

The Court: I was going to make an order that the cases be consolidated for trial. There is no necessity of filing findings of fact and conclusions of law and judgment in each of these cases, so the cases will be consolidated for trial. The evidence received in one case will be received in all cases.

I have here a motion to dismiss and/or judgment on the pleadings. Denied.

We will proceed with the trial of these cases.

I think that most of the issues have been agreed to between the parties. The only real issue, as far as I can ascertain, is whether or not there was a promise on the part of the government to change the regulation. I think the defendants all admit that if they are bound by the official regulations, they are in violation. I think the government admits if they can rely upon the promises and representations in the letter they received, they are not in violation.

I think that [6] is the only question of fact left before the court.

Mr. Dooley: Your Honor, there was one admission that I called upon the defendants to admit that was minor in nature, and yet plaintiff believes he should introduce some evidence on that point if the defendants will not admit the point.

The Court: What is it?

Mr. Dooley: That the purchases of the containers referred to in Schedule A attached to the complaint purchased the same in the course of their trade or business. I will read directly from the complaint.

The Court: Well, let's get the admissions and see if the defendants will not admit it now. Which admission is it? Is it A?

Mr. Dooley: A, I believe, your Honor, and B. B is an evidentiary admission going to establish that fact.

The Court: Well, under the Request for Admission:

"Come now the defendants in the above-entitled causes and in answer to the request by the United States of America for admission under Rule 36 object to the requests enumerated (a), (b), and (c) on the grounds that said matters are not within the knowledge of these defendants."

The first request is: "That the purchases of the containers specified in columns 1, 2, and 3 of Schedule 'A' attached to the complaint filed herein, purchased the same in [7] the course of their trade or business."

Can't you admit they did? How else could they be purchased?

Mr. Campbell: There are two situations, your Honor, in one of which these various dealers who are here before the court in many instances sold to each other, which were for resale.

As to the other purchases, I have no doubt that they purchased in the usual course of their trade or business. However, we have no means of knowing to what uses those particular purchases were put. So far as we know, they were purchased in the course of trade or business.

The Court: What difference does it make? I don't think it makes any difference at all, does it?

Mr. Campbell: It makes a difference as to whether or not the government has jurisdiction or the right to sue for the overcharges. The Act provides that the government in some instances has a right to sue for charges and in others it does not.

The Court: Do you mean to say unless these purchases were made in the usual course of business that the government has no right to sue?

Mr. Campbell: The government only has a right to sue if they were in the usual course of business.

The Court: Can you stipulate they were sold in the usual course of business? [8]

Mr. Campbell: They were sold in the usual course of business of these dealers' business, yes, your Honor.

The Court: What difference does it make whether they were purchased or whether they were sold?

Mr. Dooley: The purchasers purchased them in

the course of their trade or business is the fact to be established in this case.

The Court: How can you establish that? Have you got all the purchasers who will testify?

Mr. Dooley: No, your Honor. I wanted to establish it in different ways. First, from the stipulation of the defendants. The defendants stipulated under (c) that from May 5, 1952, to January 31, 1953, inclusive, defendants sold the containers referred to in clauses 1, 2, 3 of Schedule A, attached to the complaint filed herein in wholesale lots. That is an admission.

An inference can be drawn that the containers if purchased or sold in wholesale lots could only be used in the course of trade or business.

Then I have a witness who is in the field of the used wooden agricultural container industry who will testify that he knows of no other use that these containers have been used for, and he has been in the field for quite some time, other than in the course of trade or business. He will testify what use they were put to. [9]

Then, if necessary, I will have to call each of the defendants under Rule 43(b) to question them as to the type of persons to whom they sold them and just what business they were engaged in, if they know.

The Court: These defendants sold, there is no question that these defendants sold the containers?

Mr. Campbell: That's right, your Honor.

The Court: There is no argument they weren't sold in the ordinary course of business.

Mr. Campbell: That is correct.

The Court: I don't know why it is material at this time to determine whether or not the purchasers were purchasing them in the ordinary course of business. As far as I am concerned, they were. I am not interested in going into that. Suppose we let that go and if it becomes a real issue in this case, we will go into it.

Mr. Dooley: Your Honor, I would like to have a little evidence other than stipulation for the purpose of the record.

The Court: All right. You may call any witness you want to.

Mr. Dooley: All right. Mr. Frank Alvarado, will you take the stand? [10]

FRANK ALVARADO

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Frank Alvarado.

The Clerk: Will you spell your last name?

The Witness: A-l-v-a-r-a-d-o.

Direct Examination

Q. (By Mr. Dooley): Mr. Alvarado, what is your business?

A. I am the owner of the Alvarado Crate Company.

Q. Where is that business located?

(Testimony of Frank Alvarado.)

A. 2110 East 15th Street, Los Angeles.

Q. Is that in California? A. Yes, sir.

Q. What does your business involve, Mr. Alvarado?

A. Produce containers of all types.

The Court: Second hand?

The Witness: Second hand, and also new.

Q. (By Mr. Dooley): How long have you been in this business? A. Since 1936. [11]

Q. I will show you a document which purports to be ceiling price regulation 142, and call your attention to Section 2 of that regulation. Will you tell the court, please, whether the types of containers enumerated in this regulation are the type of containers which you sell?

Mr. Campbell: Object to that as immaterial, what this witness sells.

The Court: Objection overruled.

Mr. Campbell: I will stipulate that the document is a true copy of Regulation 142, and it may be received, if Mr. Dooley desires to offer it.

Mr. Dooley: I think the court will take judicial notice of an administrative regulation.

The Court: I would, but if you have an extra copy of it for the purpose of the record, it would be advisable to file it as an exhibit.

Mr. Dooley: Except there are underlinings.

The Court: Have you got an extra copy?

Mr. Dooley: No, except the one that has the underlinings on it.

(Testimony of Frank Alvarado.)

The Court: All right.

Mr. Dooley: The plaintiff will offer that in evidence as Plaintiff's Exhibit 1.

The Court: It may be received in evidence and the court will disregard, and so will the witness disregard, any markings [12] upon the exhibit. It may be received in evidence and marked Plaintiff's Exhibit 1.

The Clerk: Exhibit 1 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit 1.)

Southern California
Used Wooden
Agricultural Containers

PLAINTIFF'S EXHIBIT No. 1

Ceiling Price Regulation 142

APRIL 29, 1952

OFFICE OF PRICE STABILIZATION

WASHINGTON

TITLE 32A—NATIONAL DEFENSE,
APPENDIX

Chapter III—Office of Price Stabilization,
Economic Stabilization Agency

[Ceiling Price Regulation 142]

CPR 142—SOUTHERN CALIFORNIA USED
WOODEN AGRICULTURAL CONTAINERS

Pursuant to the Defense Production Act of 1950, as amended, Executive Order 10161 and Economic Stabilization Agency General Order No. 2, this Ceiling Price Regulation 142 is hereby issued

STATEMENT OF CONSIDERATIONS

This regulation establishes dollars and cents ceiling prices for used wooden agricultural containers sold in the area adjacent to the cities of Los Angeles and San Diego, California. Approximately 630 wholesalers-growers, packers and shippers of fruits and vegetables—sell their products to retail stores, restaurants, hotels, hospitals and similar organizations in that area. All of these latter organizations for the purpose of this regulation are classified as retailers. The food products are packaged in wooden or partially wooden containers and when their contents are sold to the retailers, title to the containers is transferred to them. No definite or specific price is charged for the package. After the contents are removed, the containers, in varying states of disrepair, are sold to used container dealers who maintain facilities to store, repair, recondition or rebuild them. There are approximately 127 used container dealers in the affected area.

The dealers purchase crates in small odd lots from a comparatively large number of retailers. They recondition the containers and accumulate them in their yards. They are sorted into by the sizes and types commonly used by the wholesalers of fruits and vegetables and are sold to them for re-use in the handling of those products.

Because of the seasonal nature of the fruit and vegetable business ceiling prices under the General Ceiling Price Regulation were established during a period of fewest sales, and proved to be inadequate for a large segment of the used container industry, particularly the used container dealers.

The General Ceiling Price Regulation level of prices created an unbalanced condition in the cost-price relationship between the three classes of persons involved in this industry in the Los Angeles and San Diego areas and has impeded the free flow of containers which normally exists.

Because of the inadequacy of price data for dealers during the GCPR base period, figures were obtained from cer-

tain fruit and vegetable wholesalers who purchased used containers from dealers. From these figures and from the data obtained from dealers, a level of GCPR base period prices for dealers was projected. This regulation establishes dealers' ceiling prices at a level approximately 18 percent above the projected GCPR base period price level when the differentiation in grades of containers is taken into consideration. The level of ceiling prices for retailers was then set to reflect the historical differences between retailers' and dealers' prices. The increase over the GCPR base period prices was necessary since December and January are off-season in the produce growing period and prices for used fruit and vegetable containers are at a seasonally low level.

The practice in the used fruit and vegetable container industry has been to classify containers into various groups, and size variations within the group are not given consideration in pricing the commodity. That practice has been followed in this regulation.

In the judgment of the Director of Price Stabilization, the ceiling prices established by this regulation are generally fair and equitable and are necessary to effectuate the purposes of Title IV of the Defense Production Act of 1950, as amended.

So far as practicable, the Director of Price Stabilization gave due consideration to the national effort to achieve maximum production in furtherance of the objectives of the Defense Production Act of 1950, as amended; to prices prevailing during the period from May 24, 1950 to June 24, 1950, inclusive, to those prevailing during the period January 25, 1951 through February 24, 1951, as well as the level of prices prevailing just before the issuance of this regulation; and to all relevant factors of general applicability.

In formulating this regulation, the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under the circumstances and has given consideration to their recommendations.

REGULATORY PROVISIONS

- Sec.
1. What this regulation does.
 2. Ceiling prices for specified items.
 3. Ceiling prices for special containers, parts or services.
 4. Delivery charges.
 5. Records.
 6. Adjustable pricing.
 7. Petitions for amendment.
 8. Interpretations.
 9. Transfer of business of stock in trade.
 10. Prohibitions and violations.
 11. Eviction.
 12. Definitions.

AUTHORITY Sections 1 to 12 issued under sec 704, 64 Stat 816 as amended, 50 U S C App Sup 2154. Interpret or apply Title IV, 64 Stat 803, as amended, 50 U S C App Sup 2101-2110, E O 10161, Sept 9, 1950, 15 F R 6105, 3 CFR, 1950 Sup

SECTION 1. What this regulation does
(a) This regulation establishes dollars and cents ceiling prices for certain sales of used agricultural containers, constituent wooden parts thereof, when ready to be assembled into a container, and services supplied in connection with those containers. These ceiling prices apply to the transactions specified in paragraph (b) of this section.

(1) The term "agricultural container" means any box, crate, tray, lug, cup, hamper, basket, carrier or similar container made of wood, or a combination of wood, solid fibre or corrugated board customarily used for picking, handling, storing, or shipping, fruits, vegetables, and other farm products.

(2) Expressly excluded from the provisions of this regulation are coopered products, veneer drums, ply-wood drums, and containers made entirely of solid fibre or corrugated board.

(b) This regulation applies to sales of the products and connected services specified in paragraph (a) of this section made by retailers with business establishments in the California counties of Imperial, Inyo, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura. It also applies to sales of such products and connected services made by dealers with business establishments located in the counties listed.

(c) This regulation supercedes the General Ceiling Price Regulation with respect to the transactions covered.

Sec. 2 Ceiling prices for specified items. If you are a retailer or dealer in used agricultural containers, your ceiling prices, for used agricultural containers and extra parts, f. o b place of loading, and for services supplied in connection with them, are the following:

Item	Container	Name	Retailer, as a (each)	Dealer, grade 1 (each)	Dealer, grade 2 (each)
1	Peach	Flat	\$0.04	\$0.07	\$0.05
2	Avocado	Flat	04	07	05
3	Strawberry	Tray	04	07	05
4	Tomato	Flat	07	12	09
5	L A	Lug	07	12	09
6	Melon	Box	06	12	08
7	Tomato	4-box crate	04	09	06
8	Melon	Persian box	04	13	09
9	Apple	N. W. box	08	13	10
10	Apple	California box	08	13	10
11	Pear	Box	06	10	08
12	Lemon	Box	06	12	08
13	Orange and grapefruit	Crate	13	20	17
14	Celery	Sturdy box	08	13	10
15	Melon	Jumbo crate	06	18	12

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PLAINTIFFS' EXH. No. 1 CONT.

Name	Standard	Retailer's rate (each)	Dealer, grade 1 (each)	Dealer, grade 2 (each)
	Standard crate	\$0.06	\$0.18	\$0.10
	Pony crate	.06	.18	.10
	Crate	.06	.18	.10
	No. 1 crate	.13	.24	.15
	No. 2 crate	.13	.24	.15
	Crates	.06	.14	.10
	Box	.06	.10	.07
	Box	.06	.10	.07
			.03	
				.02
				.03

1. Additions by dealers for sanding crates at purchaser's request, may be as follows:

- through 3—2 cents each.
- through 8—3 cents each.
- through 14—4 cents each.
- through 18—5 cents each.

1 grade is a good, clean container, constructed from sound lumber and free from large knots, splits, checks, defects which will weaken the container from its good appearance. It will be no loose or broken slats, ends, and the parts shall be securely fastened. The container shall be clean with no stains or papers sanded off, and shall be a container for the purpose intended.

2 grade is a container with slight material construction or appearance which do not affect the use of the container as a package for the picking, storing, or shipping of fruits, and other farm products. The container need not be sanded.

1 grade and Number 2 grade containers usually require cleats, shall be nailed to the top of each end with the outside of the container lining over the inside to hold the cleats in place and to provide a means of fastening the container.

A charge may be made for the two containers which usually require ceiling price established by this may, however, be charged for extra fastenings to those containers, or fixed to containers which do not require them.

Ceiling prices for special containers or services. (a) If you sell, in the manner specified in (b), any agricultural container, part or service covered by this regulation for which you cannot determine price under this regulation, you shall make application by mail, return receipt requested to the Los Angeles, California, or California, District Offices of Price Stabilization, for a complete description of the part or service, your proposed price, your method of arriving at the price, and the reasons why you propose the level of ceiling price established by this regulation. The ceiling price must be in the level of ceiling prices established by this regulation.

(b) You may not sell and deliver the container, part or service until a ceiling price has been approved by the Office of Price Stabilization. If the Office of Price Stabilization does not disapprove your proposed ceiling price within 20 days from receipt of your application, you may thereafter use your proposed ceiling price, subject to non-retroactive disapproval or modification at a later time, unless the Office of Price Stabilization requests further information. You shall supply the requested information by registered mail, return receipt requested. If the Office of Price Stabilization does not disapprove your proposed ceiling price within 20 days from receipt of the additional information, you may thereafter use your proposed ceiling price, subject to non-retroactive disapproval or modification at a later time.

Sec. 4. Delivery charges. If delivery is by common carrier or contract carrier the actual transportation costs paid or incurred by you may be added to the ceiling prices. If shipment is by truck owned or controlled by you, you may add to the ceiling prices transportation costs not in excess of the common carrier or contract carrier charge for a like shipment.

Sec. 5. Records. Every person who, in the manner specified in section 1 (b), sells used agricultural containers subject to this regulation shall make, keep, and preserve, and every person who in the regular course of trade or business buys used agricultural containers sold in the manner specified in section 1 (b) shall keep and preserve, for a period of two years after the date of each sale, for inspection by the Director of Price Stabilization, accurate records of each sale or purchase made after the effective date of this regulation. The records must show the date of the sale or purchase, the name and address of the seller and purchaser, and the price charged or paid, itemized by quantity and size. The records must indicate whether each purchase or sale is made on an f.o.b. or on a delivered basis, the shipping point, and transportation charges if any.

Sec. 6. Adjustable pricing. Nothing in this regulation prohibits you from making a contract or offer to sell at (a) the ceiling price in effect at the time of delivery, or (b) the lower of a fixed price or the ceiling price in effect at the time of delivery. You may not, however, sell or agree to deliver at a price to be adjusted upward in accordance with any increase in a ceiling price after delivery.

Sec. 7. Petitions for amendment. If you desire to have this regulation amended, you may file a petition for amendment, in accordance with the provisions of Price Procedural Regulation 1, Revised.

Sec. 8. Interpretations. If you want an official interpretation of this regulation, you should write to the District Counsel of the proper OPS District Office. Any action taken by you in reliance upon and in conformity with a written official interpretation will constitute action in good faith pursuant to this regulation. Further information on

obtaining official interpretations is contained in Price Procedural Regulation 1, Revised.

Sec. 9. Transfers of business or stock in trade. If a business, assets, or stock in trade are sold or otherwise transferred after the effective date of this regulation and the transferee carries on the business or continues to deal in the same type of commodity in an establishment previously owned or operated by him, the ceiling prices of the transferee shall be the same as those to which his transferor would have been subject, if no such transfer had taken place, and the transferee's obligation to keep records sufficient to verify such price shall be the same. The transferor shall either preserve and make available or turn over to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the provisions of this regulation.

Sec. 10. Prohibitions and violations.

(a) You shall not do any act prohibited or omit to do any act required by this regulation, nor shall you offer, solicit, attempt, or agree to do or omit to do any such acts. Specifically, but not in limitation of the above, you shall not, regardless of any contract or other obligation, sell and no person in the regular course of trade or business shall buy from you at a price higher than the ceiling prices established by this regulation, and you and buyers from you shall keep, make, and preserve true and accurate records and reports required by this regulation.

(b) If you violate any provisions of this regulation, you are subject to criminal penalties, enforcement action, and actions for damages. Prices lower than the ceiling prices may be charged, paid, or offered.

(c) If any person subject to this regulation fails to prepare or keep any record or file any report required by this regulation in connection with the establishment of his ceiling price, or if any person subject to this regulation fails to establish a ceiling price or apply to the Office of Price Stabilization for the establishment of a ceiling price, if he is required to do so, the Director of Price Stabilization may issue an order fixing his ceiling prices. Any ceiling price fixed in this manner will be in line with ceiling prices generally established by this regulation. The order fixing the ceiling price may apply to all deliveries or transfers completed prior to the date of issuance of the order. The issuance of such an order will not relieve the seller of his obligation to comply with the requirements of this regulation or of the various penalties for failure to do so.

Sec. 11. Evasions. Any means or device which results in obtaining indirectly a higher price than is permitted by this regulation, or in concealing or falsely representing information as to which this regulation requires records to be kept, is a violation of this regulation. This prohibition includes, but is not limited to, means or devices making use of commissions, services, cross-sales, trans-

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on arrangements, premiums, dis-
special privileges, up-grading,
agreements, and trade under-
ings, as well as the omission from
s of true data or the inclusion in
s of false data.

12. *Definitions.* This ceiling
regulation and the terms which
r in it shall be construed in the
ing manner, unless otherwise
required by the context. This
is defined in section 1 of this
ation.

Dealer. This term means a per-
who has facilities to store, repair, re-
tation or rebuild agricultural con-
s and who purchases them from
ers for resale.

Delivered. A commodity shall
emed to have been delivered if it
ceived by the purchaser or by any
er, including a carrier owned or con-
d by the seller, for shipment to the
haser.

(d) *Office of Price Stabilization.* This
term means the Director of Price Stabili-
zation and also applies to any official
(including officials of regional or district
offices) to whom the Director of Price
Stabilization delegates a function, power
or authority referred to in this regula-
tion.

(e) *Person.* This term includes any
individual, corporation, partnership, as-
sociation or any other organized group of
persons or legal successors or represen-
tatives of the foregoing, and the United
States or any other Government or their
political subdivisions or agencies.

(f) *Records.* This term means books
of accounts, sales lists, sales slips, orders,
vouchers, contracts, receipts, invoices,
bills of lading and other papers and doc-
uments.

(g) *Retailer.* This term means a per-
son who purchases fresh, canned or
dried fruits, vegetables, or other farm
products in agricultural containers,
empties the contents, and thereafter sells

the containers. It includes, but is not
limited to, grocery stores, canneries, res-
taurants, hotels, markets and institu-
tions. It does not include Army and
Navy establishments.

(h) *Sell.* This term includes sell,
supply, dispose, barter, exchange, trans-
fer and deliver, and also contracts and
offers to do any of the foregoing. The
term "buy" and "purchase" shall be con-
strued accordingly.

(i) *You.* The pronoun "you" as used
in this regulation means retailers and
dealers subject to this regulation.

Effective date. The effective date of
this regulation is May 5, 1952.

NOTE. The reporting and record-keeping
requirements of this regulation have been
approved by the Bureau of the Budget in
accordance with the Federal Reports Act of
1942.

ELLIS ARNALL,

Director of Price Stabilization.

APRIL 29, 1952.

PLAINTIFFS' EXH. No. 1 CONT.

(Testimony of Frank Alvarado.)

The Court: Now, will you read the question?

(Question read.)

The Witness: Yes, sir.

Q. (By Mr. Dooley): Are you familiar with the uses to which those types of containers are put?

A. Yes, sir.

Q. Will you tell the court just what uses, to what uses these containers are put?

Mr. Campbell: Objected to as calling for a conclusion of this witness, no proper foundation laid for this type of testimony.

The Court: Overruled.

The Witness: For produce.

Q. (By Mr. Dooley): Will you explain just what you mean by produce?

A. Fruit and vegetables.

The Court: You mean they are containers for fruits and vegetables?

The Witness: Yes, sir.

Q. (By Mr. Dooley): And to whom are those containers sold? [13]

The Witness: Well, we sell——

Mr. Campbell: Just a minute. I am going to object to that. What containers are you referring to?

The Court: Sustained as to whom. You might ask to whom he sells the containers. That is within his knowledge.

Q. (By Mr. Dooley): To whom do you sell the containers? A. We sell——

Mr. Campbell: Objected to as immaterial, what he sells to.

(Testimony of Frank Alvarado.)

The Court: Overruled.

The Witness: We sell to growers largely.

The Court: Are you in the wholesale or retail business?

The Witness: Wholesale.

The Court: And you sell in wholesale lots to growers?

The Witness: To growers, yes.

Q. (By Mr. Dooley): What do they do with these containers, if you know?

Mr. Campbell: Objected to, immaterial, calling for a conclusion of the witness.

The Court: Overruled. If you know how they use them, tell us.

The Witness: Produce. They put produce back in to bring them to the market.

Q. (By Mr. Dooley): You have testified that you have been in this business since 1936, I believe.

A. Yes, sir.

Q. Is there any other use you have seen these containers put to, types of containers in CPR 142, other than you have testified?

Mr. Campbell: Same objection, immaterial, incompetent.

The Court: Overruled.

The Witness: Well, there is a very small percentage my company sells for other uses. It would be hardly worth mentioning.

The Court: Do you sell any for any other use at all?

(Testimony of Frank Alvarado.)

The Witness: I don't know offhand. A very small amount, if any at all.

The Court: My understanding is you sell in wholesale lots to the growers.

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): What do these growers do with the containers?

A. Well, we sell to them to put produce back in to bring to the market, and I believe that is what they do with them.

Mr. Dooley: No further questions.

The Court: Any cross examination?

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.) [15]

Mr. Dooley: Your Honor, I believe it will be necessary to call each of the defendants under 43(b).

The Court: Well, you can call one of the defendants and it may be after one of the defendants has testified we can get a stipulation that the other defendants will, if called, give substantially the same testimony. Have you got one in mind that you would like to call?

Mr. Dooley: Let's take the No. 1 defendant, Mr. Dix.

The Court: All right.

Mr. Dooley: Mr. Dix, will you take the stand?

BENJAMIN DIX

one of the defendants herein, having been first duly sworn, was called as a witness under Rule 43(b) and testified as follows:

The Clerk: State your name, sir.

The Witness: Benjamin Dix.

Mr. Campbell: This witness is being called pursuant to 43(b).

Mr. Dooley: Yes.

Direct Examination

Q. (By Mr. Dooley): Mr. Dix, you are with the Dix Box Company, are you not? [16]

A. Right.

Q. Where is that company located?

A. 1023 East 14th Street, Los Angeles.

Q. Is that in California? A. California.

Q. You are a partner in that company, are you not? A. Right.

Q. And you sell wooden agricultural containers, do you not? A. Right.

The Court: Do you sell anything other than agricultural containers?

The Witness: We sell—the containers we sell were originally derived from agriculture.

Mr. Campbell: May I have that answer read?

(Answer read.)

The Court: Do you sell them wholesale or retail?

The Witness: Wholesale.

The Court: To whom do you sell them, usually?

The Witness: Well, we are not particular. We will sell them to anybody that has got money to

(Testimony of Benjamin Dix.)

pay for them, truckers, farmers, to a wholesaler, to a fellow that wants to put shelves on his wall.

The Court: Do you sell them to anybody for any purpose?

The Witness: Yes. [17]

Q. (By Mr. Dooley): I show you Plaintiff's Exhibit No. 1 in evidence and call your attention to Section 2 of this exhibit and ask you if the types of containers enumerated thereon are the types of containers sold by your company.

A. Specifically sold?

Q. Does your company sell any or all of those types of containers?

A. Well, can we go a little further with that? Sell them on the basis that these are outlined here?

The Court: No, that is not the question. Just containers. Do you deal in that kind of containers?

The Witness: Yes, we do.

The Court: You buy them and sell them?

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): To whom do you sell these containers principally?

A. Well, like I said before, to anybody that will pay for them.

Q. How long have you been in the business?

A. Since 1947 in California.

Q. 1947. Isn't it true that you sell them to growers?

A. They are part of our customers.

Q. What part would you say?

A. That would be hard to say right now.

The Court: May I ask a question of this witness?

(Testimony of Benjamin Dix.)

Mr. Dooley: Certainly.

The Court: When a party comes up to buy containers, do you say, "Are you a grower or trucker or a businessman?"

The Witness: No, I don't, your Honor. A man comes in and wants to buy some lugs. I don't particularly care what he uses them for. If he wants to buy some of those lugs——

The Court: Do you require them to give a statement of the business they are in?

The Witness: No, sir.

The Court: Or what they are going to use the lugs for or the containers?

The Witness: No, sir, we don't.

Q. (By Mr. Dooley): You have been in this business since 1947. Do you know who your customers are? A. A good part, yes.

Q. Do you know whether your customers are growers, packers, or wholesalers?

A. They would be a combination.

Q. Do you know what business the packers are in?

A. Packers—it is an involved business. One man can buy boxes and then turn around and sell them——

Q. Will you answer the question?

Mr. Campbell: Let him answer the question.

The Court: Read the question.

(Question read.) [19]

The Court: You can answer that yes or no. Well, let's start all over again. Let me ask this witness a question or two.

(Testimony of Benjamin Dix.)

Mr. Dooley: Certainly.

The Court: Do you sell them to other wholesalers?

The Witness: Yes, sir.

The Court: I understand you are in the wholesale business.

The Witness: Yes, your Honor.

The Court: You do sell to other wholesalers?

The Witness: Yes, your Honor.

The Court: Do you sell for cash or credit?

The Witness: Both ways.

The Court: Do you keep any record to indicate the business the purchasers are in?

The Witness: No, your Honor.

The Court: You have no control over the containers after they leave your place of business?

The Witness: No, your Honor.

The Court: You sell them at your place of business?

The Witness: Yes, your Honor.

The Court: You load them onto a truck or conveyance of some kind and——

The Witness: And then it becomes their property.

The Court: Do you know what happens to them after they [20] leave your place?

The Witness: No, your Honor.

Mr. Campbell: Might I state, your Honor, so far as the names of the individuals or firms to whom he has sold, he has produced pursuant to subpoena all of the records and invoices with respect to sales during the period May 5, 1952, to January 31, 1953.

(Testimony of Benjamin Dix.)

His records are here at the request of the United States Attorney. I wish the record to show he has so produced those records.

The Court: The record may so show. Now, you make a sales slip on every sale, do you not?

The Witness: Yes, your Honor.

The Court: And you keep that in your records?

The Witness: Yes, your Honor.

The Court: It shows the name of the purchaser?

The Witness: Yes, your Honor.

The Court: Does it show his address?

The Witness: Mostly not.

The Court: Does it show his business?

The Witness: No, sir.

The Court: It shows the quantity?

The Witness: It shows the quantity.

The Court: And it shows the price?

The Witness: And the price.

The Court: Does it show anything else? [21]

The Witness: The date, the quantity, the price, and by whom they were transported.

The Court: Do you mean by that by whom they were actually transported or by whom they were sold?

The Witness: The name of the person, the name of the company that actually transported the merchandise, and the name of the individual that is going to pay for the merchandise. In many cases we will sell them to a person who will never use them. Mostly it is that way. He will in turn distribute them to other people.

(Testimony of Benjamin Dix.)

Q. (By Mr. Dooley): You stated you sold——

The Court: Mr. Dooley, may I ask another question here?

Mr. Dooley: Yes, your Honor.

The Court: Is the government interested at all in second-hand containers if they are not sold and used in agriculture? In other words, if a container was sold to somebody to carry coal in, for instance, would the government have any control as to the price?

Mr. Dooley: The government would have control under any circumstances. This is a question that the defendant raised in his motion to dismiss.

The Court: Don't you pay any attention to what the defendants' defenses are going to be. You pay attention to what your case is going to be. You establish your case and let the defendant establish his case. [22]

Mr. Dooley: The government has to establish one of two things in this instance. It happens that we pleaded one. The government has to establish that the purchasers have not brought suit within 30 days from the date of purchase——

The Court: Well, that is a defense. If the defendants can show that any suit has been filed by the purchasers, it can be established by the defendants and the court will rule upon it. You don't have to meet that issue at all.

Mr. Dooley: No, your Honor. This is an alternative. We have to establish one or the other. Or, if the court please, if the court permits his amend-

(Testimony of Benjamin Dix.)

ment, and I think there is enough evidence in the stipulation to show they haven't brought suit, so it wouldn't be necessary——

The Court: That is out of the picture. I am not interested in that defense at all. It is a defense. They can plead it, if they want to, but the burden is upon them to establish it.

Mr. Campbell: We do not take the position that is a defense, and we take the position under the statute that is a necessary prerequisite to the government bringing suit.

The Court: I disagree with you and I will overrule your contention.

Mr. Campbell: I understand.

The Court: Here is what I am interested in. This regulation 142 was made to control the price of agricultural containers. [23] Supposing that agricultural containers were sold for other purposes? Does the regulation apply?

Mr. Dooley: Well, I think it does, your Honor.

The Court: Where is your authority? Supposing that this defendant would sell 1,000 boxes to a manufacturing plant for the purpose of making bins for the keeping of bolts and nuts and screws, and so forth? Suppose he sold them 5 cents over the market? Could the government complain?

Mr. Dooley: I think it could. I mean I think the defendant—I was going to ask the defendant a question. I think the defendant will state that most of the containers——

The Court: Let me see that Exhibit 1. It says

(Testimony of Benjamin Dix.)

here this regulation establishes dollars and cents ceiling price for used wooden agricultural containers sold in the area. It doesn't say anything about the use. It doesn't say anything about purchase. All it says is if the agricultural containers are sold.

Mr. Dooley: Your Honor, that is in the statute we are trying to comply with, 2901(c) of 50 USCA Appendix.

The Court: Let me ask the attorney for the defendants, how are you going to get around this provision that this concerns the agricultural containers sold? Does it make any difference what happens to them after they are sold?

Mr. Campbell: The statute is clear and the regulation is clear that they are agricultural containers and that is all [24] it applies to. We admit we sold so many boxes of a certain description at a certain price in that period.

The Court: This man deals in agricultural containers. Do you deal in anything other than agricultural containers?

The Witness: No, your Honor.

The Court: So he sells agricultural containers.

Mr. Campbell: But he doesn't know the use they are put to.

The Court: I don't think the use makes any difference. If it said "agricultural containers sold and used," it would make a lot of difference, or if it said, "agricultural containers used in the area," it would make a difference, but the regulation says "sold."

(Testimony of Benjamin Dix.)

Mr. Campbell: Are we possibly confusing terms? I think the term "agricultural container" refers to a container used for agricultural purposes. He is dealing in boxes.

The Court: No. Your own witness has just testified he doesn't sell anything but agricultural containers.

Mr. Campbell: May I ask him a question on voir dire?

The Court: Yes.

Voir Dire Examination

Q. (By Mr. Campbell): You say you sell agricultural containers. By that do you refer to certain types of boxes and crates and flats? [25]

A. Yes.

Q. Do you know yourself what use they are put to after they leave your yard?

A. We have no idea.

Q. You don't know whether the person purchasing them stores or packs or keeps agricultural products in them? A. No idea at all.

Q. You do know some of the boxes which you sell are sold for other than agricultural purposes?

A. Yes, I do.

Q. As a matter of fact, some are sold in the poultry industry? A. Definitely.

Q. Quite a large number?

Mr. Dooley: Your Honor, this should be gone into after the plaintiff finishes with the witness.

The Court: This is on voir dire to find out what

(Testimony of Benjamin Dix.)

is meant by the word "sold." Suppose you have an orange crate. Everybody knows what an orange crate is. Suppose it is sold to a chicken man. Suppose this defendant knows it. However, he is selling an orange crate which is an agricultural box.

Mr. Campbell: It is an agricultural box if used in the industry of agriculture.

The Court: That isn't what it says.

Mr. Campbell: If you visit most of the mountain and seashore [26] cabins in Southern California, you will find the variety of uses for those boxes we term orange boxes, but they no longer retain their character as orange boxes except for the purpose of identification.

The Court: It doesn't make any difference. All that is necessary is to establish that they are wooden agricultural containers and they are sold. What happens to them after that, I don't think makes any difference. This defendant has said he deals in agricultural containers, and he sells agricultural containers.

Mr. Campbell: The statute makes a distinction as to whether they are used in trade or business or not.

The Court: Where does it make a distinction? What book have you got there?

Mr. Campbell: Title 50 Appendix, Section 2109.

The Court: Wait a minute. 50 Appendix, 2109?

Mr. Campbell: That is the Defense Production Act of 1950.

(Testimony of Benjamin Dix.)

The Court: Let me get my volume here and let me see what the statute says.

Mr. Campbell: That is a section, your Honor, which provides the instances in which the government may proceed with a suit to collect alleged overcharges.

The Court: Here is the situation we have got here. Is the government going to be required, not only to establish [27] not only that this defendant dealt in agricultural containers, sold agricultural containers, but is the government going to have to go one step further and prove they were used in agriculture?

Mr. Campbell: I believe so, and apparently the government believes so, also.

The Court: You mean they will have to chase down every last one of these sales and determine whether or not they were used in agriculture?

Mr. Dooly: The government says this, your Honor, that we have to prove the alternative, either that the purchasers haven't brought suit within 30 days, or they were purchased in the course of their trade or business. The defendants in their stipulation——

The Court: This defendant has just testified he sold them. He hasn't testified he didn't sell them in the course of his business. He sold merchandise. The thing I am interested in is whether or not you are going to have to establish that the merchandise that was sold was used in agriculture.

Mr. Dooley: No.

(Testimony of Benjamin Dix.)

The Court: Just a minute. I have got Section 2109.

Mr. Campbell: Section C, your Honor, recovery of overcharges by buyer.

The Court: Where does it say anything about the use of the agricultural containers? [28]

Mr. Campbell: The first sentence of C.

The Court: If any person sells any materials or services and violates a regulation or order prescribing a ceiling or ceilings——

Mr. Campbell: The person who buys such material or service may within one year bring an action for the overcharge.

The Court: That says people may bring an action.

Mr. Campbell: Then if you will go down to the following two sentences, you will see the President as such only has the right to sue under the instance set forth in the statute. Aside from the statute, the President has no right as far as these defendants are concerned to institute an action in his own name or in the name of the United States.

The Court: Have you got any cases that say that the government has to establish the fact that these boxes were used in agriculture?

Mr. Campbell: I have the authority which I quoted to your Honor in my motion to dismiss where the point was raised that the government complaint was fatally defective by reason of failure to assert these prerequisites. In that case, however, the court found the saving language in the com-

(Testimony of Benjamin Dix.)

plaint, the general allegation that the government had complied with all the regulations required, and therefore saved the complaint. However, it is indicative of the fact that without that saving language, which is not present in this case, that the complaint [29] would have been found fatally defective. That is the only case I have found one way or the other on this matter of pleading, aside from the language set forth in the statute to which I have called your attention.

The Court: I am going to hold it is only necessary for the government to establish the fact that the wooden agricultural containers were sold, and after they were sold and delivered, I am not interested in what happened to them.

Mr. Campbell: May an exception be noted?

The Court: You can have an exception, and the government will have an exception also.

Mr. Dooley: I would like then, your Honor, to amend the complaint as indicated in my opposition to defendant's motion.

The Court: Suppose you wait until the end of the evidence and then you can move to amend. You may have some more amendments you want to make.

Mr. Dooley: May I finish with this witness?

The Court: Yes.

Direct Examination—(Resumed)

Q. (By Mr. Dooley): You stated, Mr. Dix, you sold to growers, wholesalers and packers and so on?

(Testimony of Benjamin Dix.)

A. Yes.

Q. You also stated you have been in business since 1947? [30]

A. That's right.

Q. Will you tell the court what packers do?

The Court: If there is an objection to that, I will sustain the objection. It is immaterial. It doesn't make any difference what the packers do with these boxes. The only question is, were they sold? Were they agricultural containers and were they sold? This witness says they are agricultural containers and they were sold. That is all. So in the absence of defendants objecting, I will object. The question is immaterial as far as I am concerned, in these cases.

Mr. Dooley: No further questions, your Honor.

The Court: Any questions?

Mr. Campbell: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Now, can we have a stipulation if all the rest of the defendants were called, that their testimony would be substantially the same relative to the dealing in agricultural boxes and selling to anybody that comes along?

Mr. Campbell: We can so stipulate.

Mr. Dooley: I won't agree, because I didn't get an opportunity to cross examine the witness on that.

Mr. Campbell: He was your witness.

The Court: You called him under the statute for cross [31] examination.

Mr. Dooley: But the court said the question was

immaterial and the government takes exception to that very much for the simple reason if he testifies what the packers do, that they take these crates and put fruits and vegetables in them and ship them, the inference will follow that the packers purchased the containers in the course of their trade or business, and also if he testifies the growers do, the inference follows that they purchased them in the course of their trade or business.

The Court: Mr. Dooley, assume that you are engaged in the business of dealing in second-hand agricultural containers. You have a place of business out here on Olympic Boulevard. You have a lot of boxes and containers on display. A fellow comes up and says, "I want to buy 1,000 potato crates. Have you got them?"

You say, "Yes."

"How much do you want for them?"

You give him the price.

He says, "Put them on the truck."

Do you say to him, "Oh, no, I can't put them on the truck. I want to know what you use these for, where you are going to take them"?

Mr. Dooley: But Mr. Alvarado, the plaintiff's first witness, is in the same business these defendants are in, and he [32] testified to what was done, who he sold to, and he said only a very slight percentage could possibly be used for any other purpose but for fruits and vegetables.

Mr. Campbell: That is his business.

The Court: I have bought a lot of oranges and grapefruit in my time, and I have a lot of shelves

made of orange and grapefruit boxes. They make good shelves.

Mr. Dooley: If your Honor please, may I recall the witness and ask him with regard to percentages?

The Court: Yes, you can recall the witness, if you want to. You don't have to bring back your records, Mr. Dix, but just come back to the stand.

BENJAMIN DIX

one of the defendants herein, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Dooley): You are a partner in this Dix Box Company, are you not?

A. That's right.

Q. What percentage of your sales would you say is made to packers?

A. I have no way of knowing.

Q. You don't check your records? [33]

A. No, sir, I don't.

Q. You are not familiar in any way with your customers?

A. I know who my customers are, but what they do with them, I have no way of knowing.

Q. Do you know your largest customers?

A. Yes, I know all my customers.

Q. What business are they engaged in?

A. Well, primarily, my largest customers are in the business of hauling, he is in the trucking business.

(Testimony of Benjamin Dix.)

Q. What do they do?

A. He trucks boxes, he trucks merchandise, anything that somebody wants him to haul.

Q. You will note from the types of containers that you looked at a few moments ago, it says peach trays, and so forth. Are you familiar with the purpose of those boxes?

A. Not peach trays. We don't sell them.

Q. May I see Plaintiff's Exhibit 1? Peach flats.

A. There is no peach flat. We don't sell a peach flat. We don't distinguish them that way.

Q. You stated a few moments ago you sold different types of containers.

A. I said we sold some of the types.

Q. Not all? A. Not all.

Q. Do you sell avocado flats? [34]

A. We do.

Q. Are you familiar with the use of avocado flats?

A. I am familiar with what it was designed for.

Q. What was it designed for originally?

A. Brand new, it was designed for avocados.

Q. When you get these containers used, what do you do with the boxes?

A. We recondition them and sell them.

Q. Do you sell tomato flats?

A. Yes, we do.

The Court: Can't you stipulate that the containers that were sold were originally used in agriculture?

Mr. Campbell: I presume they were.

(Testimony of Benjamin Dix.)

The Court: Do you handle any boxes and crates that were not originally designed for agricultural use?

Mr. Campbell: I will stipulate that they were all designed for agricultural use, yes, your Honor.

The Witness: We do have exceptions. We will sometimes sell fish boxes.

The Court: You handle fish boxes, too?

The Witness: Yes, if somebody will sell and at a price we can afford to buy at, we buy them.

The Court: Is there a ceiling on fish boxes?

Mr. Dooley: Well, there may have been, your Honor, but it is not covered by the Regulation 142.

The Court: Do you ever get any boxes, second-hand boxes as far as traveling from place to place, but were never used?

The Witness: Do we ever get boxes that were never used?

The Court: Never used.

The Witness: We have on occasion, yes, your Honor.

The Court: I assume these purchasers will get boxes that were never used. They were designed for agricultural use and yet for some reason they get into a warehouse somewhere and were never used and then they are sold to a second-hand box place. I think the stipulation is that the merchandise that was handled by this defendant and the rest of these defendants was originally designed for agricultural use?

(Testimony of Benjamin Dix.)

Mr. Campbell: Yes, with the exception of fish boxes.

The Court: Yes.

Mr. Campbell: Generally speaking, their business was handling used containers designed for agricultural uses.

Q. (By Mr. Dooley): And the picture of the situation is this. Those boxes travel in a cycle and the retailers sell them to the dealers, the dealers recondition them, and sell them back to the farmer or packer and they fill them up again with fruits and vegetables and sell them to the retailers, isn't that true? A. I didn't follow you.

Q. Didn't those used agricultural containers travel in a cycle? You sold them to the farmers, wholesalers, packers, [36] and the packers sold to the retailers, grocery stores, markets, and so forth, and the grocery stores and markets sold them back to you and you reconditioned them and sold them again? A. It didn't follow that cycle.

Q. How did it function?

A. It is a very complicated affair. It could be a hundred ways.

Q. Enumerate them.

A. Well, the packer wouldn't sell to the retailer.

The Court: Let's assume that the manufacturer manufactures a lot of these boxes for agricultural use. He sells them to wholesalers somewhere or to a packer or to a large farm, puts them into trade.

The Witness: That could be one of the methods.

(Testimony of Benjamin Dix.)

The Court: Then they are filled with agricultural products, and after they are filled with agricultural products, they probably go to a wholesaler and the wholesaler sells them back to the retailer.

The Witness: That would be one method.

The Court: The retailer sells to the general public, and when he gets through, he has an empty agricultural container. He takes the container and sells it to a box company, isn't that right?

The Witness: That is one of the methods.

The Court: And then the box company reconditions them [37] and puts them back into where it can be used again and filled with agricultural products, and it will gradually come back to the store and be emptied of the agricultural product.

The Witness: That is one of the methods.

The Court: What other method is there?

The Witness: We will sell boxes to one man and he will turn around and sell them to another man, who will turn around and sell them to a third or fourth party.

The Court: That is true, but it eventually comes back to the agricultural field where it is filled with produce?

The Witness: At least part of it.

The Court: At least part of it.

The Witness: At least part of it.

The Court: There is always a mortality, isn't there, just from being banged up and destroyed?

The Witness: Yes.

(Testimony of Benjamin Dix.)

The Court: All right.

Mr. Dooley: No further questions.

(Witness withdrawn.)

The Court: Mr. Dooley, are you willing to accept the stipulation that all of these defendants will testify substantially the same as the witness who has left the stand?

Mr. Dooley: I would like to call one more of the defendants, your Honor. [38]

The Court: Well, it is pretty near 11:00 o'clock. Before you call the next witness, we will take our morning recess.

Mr. Campbell: Maybe Mr. Dooley can indicate who is the next victim.

Mr. Dooley: I prefer not to, your Honor.

The Court: We will recess until 5 minutes after 11:00.

(Recess.)

Mr. Dooley: Your Honor, Mr. Alvarado has an appointment and I wonder if your Honor intends to recall him.

Mr. Campbell: I have no objection to letting him go.

Mr. Dooley: Then may the witness be excused?

The Court: He may be excused.

Mr. Dooley: Thank you.

The Court: Call your next witness.

Mr. Dooley: The plaintiff calls David Savetnick.

DAVID SAVETNICK

called as a witness herein under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: David Savetnick.

The Clerk: Spell the last name.

The Witness: S-a-v-e-t-n-i-c-k. [39]

Direct Examination

Q. (By Mr. Dooley): Mr. Savetnick, you are with the Produce Box and Crate Company, are you not? A. Yes, sir.

Q. Where is that located?

A. 767 Ceres Avenue, Los Angeles, California.

Q. You are the owner of that company, are you not? A. Yes, sir.

Q. How long have you been in the business?

A. About 10 years.

Q. About 10 years? A. Yes, sir.

Q. What is your business?

A. Produce containers.

The Court: That is, you sell second-hand?

The Witness: Yes, sir.

The Court: Do you sell any new?

The Witness: Not likely.

Mr. Campbell: I can't hear you.

The Witness: No, sir, just used.

Q. (By Mr. Dooley): Is it not true, Mr. Savetnick, that your principal purchasers are growers, packers and wholesalers?

A. Yes, sir, with some exceptions. [40]

(Testimony of David Savetnick.)

Q. What percentage are the exceptions?

A. Well, it is difficult to state exactly.

Q. What would you say?

A. Oh, sometimes it varies. Maybe 5, maybe 10, maybe less, maybe more. It is rather difficult to be specific.

The Court: What is the exception?

The Witness: For instance, your Honor, at certain times I sell boxes to a man that has a book shop and he uses those boxes for shelves. At other times we sell them to poultry people. Those are the exceptions, your Honor.

Q. (By Mr. Dooley): But you always sell to persons in business, is that correct?

A. Yes, sir.

Q. You don't sell to any other persons other than those in business?

A. Other than what I stated, with some exceptions. We sell to other people. If a man comes in and wants to buy a certain amount of boxes legitimately, I wouldn't think of refusing to sell those boxes.

Q. You sell them in wholesale lots, do you not?

A. Yes, sir.

Q. You stated that generally at least 85 per cent of your boxes are sold to wholesalers, growers and packers.

A. Yes, sir.

Q. What do wholesalers do, Mr. Savetnick? [41]

The Court: Just a minute. Are you asking what the wholesalers do who sell boxes?

Mr. Dooley: No, who purchase boxes.

(Testimony of David Savetnick.)

Mr. Campbell: That is objected to as calling for a conclusion.

The Court: Sustained. He can testify to what he does. He may be able to testify as to what wholesalers do when they sell second-hand containers, but when he steps out of the picture and says what other wholesalers do, he is not qualified to testify.

Mr. Dooley: If your Honor please, may I lay a foundation?

The Court: Yes.

Q. (By Mr. Dooley): You stated you have been in the business about 10 years, did you not?

A. Yes, sir.

Q. Are you familiar with the industry?

A. Yes, sir, as far as my knowledge allows me.

The Court: Mr. Witness, will you take your hand down from your mouth and speak up loudly so we can hear you?

The Witness: Yes, sir.

Q. (By Mr. Dooley): You are familiar with the industry? A. Yes, sir.

Q. Do you know generally what kind of business packers, wholesalers and growers are in?

Mr. Campbell: That is objected to. [42]

The Court: Maybe I can get a stipulation from the opposing side. I think the opposing side will stipulate that certain boxes and containers are used on the farms by agriculture for the containing of agricultural products. I think opposing counsel will stipulate that there are certain packing companies or packing sheds that pack agricultural

(Testimony of David Savetnick.)

products, and that these packing sheds or packers use containers to put agricultural products in.

Will you stipulate that?

Mr. Campbell: Yes, I will stipulate that.

Mr. Dooley: No further questions, your Honor.

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Dooley: Now, your Honor——

The Court: Before we go any further, I want counsel to stipulate that if all defendants in this case were called to testify, they would testify substantially the same as the two who have already testified.

Mr. Campbell: So stipulated.

The Court: That is, they are engaged in the business of selling wholesale second-hand agricultural products, that they sell to parties who come to a place of business to buy, and that they deliver their products to the truckers, they don't [43] deliver their products by themselves, but they deliver the products at their place of business.

Mr. Campbell: With one exception, your Honor. Your Honor stated they do not deliver merchandise themselves. That is not true in all instances.

The Court: Do some of them?

Mr. Campbell: Yes. Some of the boxes listed in the complaint are listed as having been delivered and allowances made in some instances for the delivery of the boxes, but I will gladly stipulate that the other witnesses will testify that they are in the

business of purchasing, reconditioning where necessary, and re-selling boxes or containers used in the pursuits of agriculture.

The Court: All right. Mr. Dooley, I want you to stipulate that the boxes are sold to anybody that comes around, that there is no inquiry made by the seller as to the use the boxes are going to be put to, and the sellers do not know what uses the boxes are put to after they leave their place of business.

Mr. Dooley: I will have to refrain, your Honor, from stipulating that. I will stipulate as the last witness testified.

The Court: I think it is immaterial.

Mr. Dooley: I honestly don't believe, your Honor, that they don't know. The question I asked as to what the packers [44] do, this last witness testified only 5 or 10 or maybe a little more percentage of his boxes were not sold to packers, growers and wholesalers. I honestly can't say that they have dealt for 10 years in that particular business and have no idea as to what packers, wholesalers and growers do.

Mr. Campbell: I will stipulate packers, growers and wholesalers of agricultural products produce, pack and ship and sell agricultural products.

Mr. Dooley: And will you also stipulate, as the last witness testified, that only between 5 or 10 or maybe a little more percentage of all containers were not sold——

Mr. Campbell: I cannot stipulate to that. I don't know the percentage of each one of them. They are selling to those who are engaged in the

business of packing, growing and wholesaling, but they don't know what actual use the boxes are put to after they leave their yard.

Mr. Dooley: I can't stipulate that they don't know the use.

The Court: Mr. Dooley, how would they know unless they followed the boxes themselves? They know, I suppose, if they sell to a packing house, they assume that the containers are going to be used by that packing house in which to put agricultural products. They don't know it unless they follow the boxes and see them being used.

Mr. Dooley: I will stipulate to this. They may not know [45] in any specific instance, but they know generally what boxes are used for by packers.

The Court: If you go down to an automobile concern and buy an automobile, the automobile concern will deliver the automobile. Can they testify as to what use you put that automobile to unless they go out and follow the automobile and see it used?

Mr. Dooley: No, not in a specific instance. The difficulty in proving a particular point like that, I was proving what was generally done in the industry, who they principally sold to. The stipulation contended that they principally sell to packers, wholesalers and growers.

The Court: Mr. Dooley, I don't want to restrict you in any way in proving your case. So you can call your next witness.

Mr. Dooley: It will be rather repetitious. It will be the same witnesses on the same points.

The Court: You have got a stipulation all these defendants will testify substantially the same way.

Mr. Dooley: As the last defendant, and I will accept that stipulation.

Mr. Campbell: I will stipulate they will all testify substantially the same as these two witnesses.

Mr. Dooley: The last witness?

Mr. Campbell: In other words, they sell to whoever comes [46] in. Generally speaking, they know these people as being in the business, growing, packing and wholesaling vegetables. What use the boxes are put to after they leave their place, they have no way of knowing. Like this last man, he sells to a book dealer and he knows they aren't going into agricultural use.

Mr. Dooley: I will stipulate they don't know in any specific instance definitely, but they know generally that they sell to packers, wholesalers and growers.

Mr. Campbell: I think our general stipulation covers that. The others are really substantially the same as these two gentlemen.

The Court: Mr. Dooley, if you are not willing to accept that stipulation, call your next witness. We have got two days, but I will insist the case be completed tomorrow. If you want to call another one of these defendants, call him.

Mr. Dooley: I will try one more, your Honor.

The Court: All right. Which one do you want to try now?

Mr. Dooley: I will call Mr. Simonian.

Mr. Campbell: Also under 43(b)?

Mr. Dooley: Yes. [47]

HARRY SIMONIAN

one of the defendants herein, called as a witness by the government under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Harry Simonian.

The Clerk: Please spell your last name.

The Witness: S-i-m-o-n-i-a-n.

The Court: You will have to speak up so we can hear you.

Mr. Campbell: May the record show this witness, as well as the last witness called, Mr. Savetnick, have produced here the records of their sales of boxes for the period May 5, 1952, to January 31, 1953, as required by the United States Attorney.

The Court: The record may so show.

Mr. Campbell: Do you have those records with you, Mr. Simonian?

The Witness: Yes.

Mr. Dooley: Do you have them on the stand?

The Court: Are you going to ask him about his records?

Mr. Dooley: It slipped my mind, your Honor. I intended to cross examine on those records. If your Honor please, I may recall the other two.

The Court: I don't think I am going to allow you to go through these records in court. You have had plenty of opportunity on discovery to determine what these records are. If you [48] have got

(Testimony of Harry Simonian.)

some notice here of some of these records you want to look at, all right, but just to say generally, no. You go ahead and examine this witness.

Mr. Dooley: All right, your Honor.

The Court: This is cross examination. You can ask him about any specific bit of evidence he has got here, but I am not going to let you go on a fishing expedition. If you have got something definite, all right.

Mr. Campbell: For the record, your Honor, may I state that the witness has produced here a small suitcase full of records which contain for the period indicated both statements and invoices purporting to show the sale of boxes, to whom sold, the quantities of each box sold on the given date, and the type of box.

The Court: May I ask this witness a question?

Mr. Campbell: Certainly.

The Court: Do these records show what purpose the boxes were going to be used for?

The Witness: Yes, sir.

The Court: That is shown?

Mr. Campbell: I don't think he understood your question.

The Court: These records you have show the name to whom the boxes were sold?

The Witness: Yes, sir.

The Court: Do they show what use the boxes were to be [49] put to?

The Witness: I don't know. I didn't take the boxes. I don't know what he put in them.

(Testimony of Harry Simonian.)

The Court: Do you know what goes into the boxes after you sell them?

The Witness: I don't know. They go to a farmer.

The Court: But you don't know what goes into the boxes?

The Witness: I don't know what is going into the boxes, fruit and vegetables.

The Court: Do you sell to farmers?

The Witness: I sell farmers.

The Court: You can cross examine, if you want.

Direct Examination

Q. (By Mr. Dooley): Mr. Simonian, you are with the Simonian Crate Company, are you not?

A. Yes, sir.

Q. Where is that? A. 836 Naomi.

Q. Is that in Los Angeles, California?

A. Yes, sir.

Q. How long have you been in that business?

A. I started 1936.

Q. How long have you been in that business?

A. I start 1936 in business.

Q. Are you familiar with the use to which the containers which you sell are put?

A. Well, only boxes. I can't understand you.

Mr. Campbell: You will have to keep your voice up. He can't hear you.

The Witness: What did he say? I don't know.

The Court: He has already testified he sold them to farmers for agricultural products to be put in them.

(Testimony of Harry Simonian.)

Mr. Dooley: I am sorry, your Honor.

Q. That refers to all the boxes that you sell?

A. Yes, all boxes.

Mr. Dooley: No further questions.

Mr. Campbell: May I ask one or two questions, your Honor?

The Court: Yes.

Cross Examination

Q. (By Mr. Campbell): Mr. Simonian, I noticed in looking at the records you produced here, you sell some boxes to other box companies?

A. Sometimes, yes.

Q. That is indicated by the records you have here, isn't that correct? A. Yes. [51]

Q. You don't sell entirely to farmers?

A. No.

Q. As a matter of fact, other than what these people buying from you tell you about it, do you know what they do with the boxes after they leave your place?

A. Well, take them to the farmer and put in the fruits and vegetables.

Q. Do you know that? A. Yes.

Q. Do you go there and see the boxes?

A. I don't go. I don't know what they put them in.

Q. You don't know what?

A. They take them to the truck and load them up and take them to the farmer.

(Testimony of Harry Simonian.)

Q. That is the last you see of the boxes, when they are loaded up at your place of business?

A. Yes.

Q. In some instances, you deliver the boxes to the purchasers direct?

A. Sometimes I deliver to farmer, you know, and then I know what he is going to put in, the fruit.

Q. But you don't see this fruit there?

A. I don't see.

Q. You don't know what the other box companies do with the boxes they buy? [52]

A. The same thing.

Q. They take them away from your yard and that is the last you see of the boxes?

A. Yes.

Q. Any knowledge you have on that is what you guess they do, isn't it?

A. Yes.

Mr. Campbell: That's all.

Redirect Examination

Q. (By Mr. Dooley): Mr. Simonian, you are relatively sure from your experience in the field that they do put fruits and vegetables in them?

Mr. Campbell: Objected to as argumentative.

The Court: Sustained.

In one of these you have A-1 Stores. What is that?

The Witness: That is a produce market.

The Court: A produce market?

The Witness: In Los Angeles.

(Testimony of Harry Simonian.)

The Court: You sell some boxes to markets?

The Witness: I sell them over there because sometimes his boxes broke and he take mine and put them in, some parts come out, broken inside, and he take my stock and put in some stuff. [53]

Mr. Campbell: May I ask one question to clarify that last?

The Court: Yes.

Mr. Campbell: That store is a wholesale seller in the produce market here?

The Witness: Yes.

Mr. Campbell: Is that correct?

The Witness: Yes.

Mr. Campbell: They are a wholesaler down in the produce market?

The Witness: Yes.

The Court: I notice you have got another market, Market Town No. 2.

The Witness: I buy merchandise, I think, from over there.

The Court: You buy some?

The Witness: I don't know which one is it? Is it Market Town in Los Angeles?

The Court: I notice another, James Ming Produce Company.

The Witness: The man got produce. He bring his merchandise from the farmer and his boxes not in good condition and he take mine and put the merchandise in my boxes.

The Court: I notice another account, California Crate Company.

(Testimony of Harry Simonian.)

The Witness: Well, he is a company, too, like me. He buys them from us. [54]

The Court: He is another wholesaler?

The Witness: Yes. He sell them to somebody else.

The Court: Then you don't sell exclusively to farmers?

The Witness: I sell farmers, too.

The Court: Farmers, wholesale companies, produce companies?

The Witness: Yes.

The Court: All right.

Mr. Dooley: One question, if I may.

The Court: Yes.

Q. (By Mr. Dooley): Then all the persons that you sell to are in business, are they not?

A. Well, some. Mostly go to farmer.

Q. In business or farmers?

A. Some produce, you know, sometimes he comes over there and his boxes broke and he picks up two or three boxes, 10 boxes, and take them over there and put his merchandise in them, in the good boxes.

Mr. Dooley: I did not catch the answer to the last question. Will you please read the answer?

(Answer read.)

Q. (By Mr. Dooley): All the persons to whom you sell in business are in farming?

A. Yes.

Mr. Dooley: That's all. [55]

Mr. Campbell: Just a question.

(Testimony of Harry Simonian.)

The Court: All right.

Recross Examination

Q. (By Mr. Campbell): Mr. Simonian, this Market Town you refer to, that is a retail market, isn't it? A. Yes.

Q. Where they sell groceries and produce and other things? A. Yes.

Q. Isn't it a fact that you both buy used boxes from and sell reconditioned boxes to them?

A. Yes. I buy empty boxes, yes.

Q. You both buy from them—— A. Yes.

Q. ——and you also sell reconditioned boxes back to them, isn't that right? A. Yes.

Q. Isn't it a fact, to your knowledge, Mr. Simonian, that the Market Town gives some of these boxes away to their customers to take their groceries away? When you go in and buy a large lot of groceries, they use some of these boxes so you can carry your groceries home?

A. I buy Market Town merchandise, empty boxes. I bring [56] them to my yard for repairing and sell to farmers.

Q. Did you know that the Market Town gives their customers wooden boxes? A. Yes.

Q. And some of those are the boxes you sold them? A. Right.

Mr. Campbell: That is what I understood. That's all.

Mr. Dooley: No further questions.

(Testimony of Harry Simonian.)

Mr. Campbell: You can step down.

(Witness excused.)

Mr. Dooley: The plaintiff is willing to stipulate all the defendants would testify substantially as the first three witnesses who testified.

Mr. Campbell: We keep broadening this out. I wasn't able to understand all the testimony, unfortunately, that this witness gave. I renew my stipulation.

The Court: Well, this witness testified he is in the business and he sold, he said he sold exclusively to farmers, but the fact of the matter is he sells not only to farmers, but to other people in the same kind of business, and to a crate company here. He sells, like the rest of these people do, to anybody that comes along.

Mr. Campbell: That's right. I will stipulate they sell to anybody that comes along. They are in the business of handling [57] containers which are ordinarily used in agricultural pursuits and the majority of their sales are made to people they believe are engaged in agricultural pursuits.

Mr. Dooley: If we just stipulate they will testify essentially the same as the first three witnesses——

The Court: All right, let it go at that. If you want to bring in any others to testify contrary, you can.

Mr. Campbell: All right. I will so stipulate.

The Court: All right.

Mr. Dooley: Your Honor, I believe CPR 142 is

already in evidence. The plaintiff asks the court to take judicial notice of the provisions of CPR 142. As the court knows, judicial notice will be taken of price regulations and their contents.

The Court: We have a stipulation that the defendants sold second-hand containers as set forth in the plaintiff's complaint.

Mr. Campbell: Sold the quantities and at the price.

The Court: Yes. We also have a stipulation, do we not, that the price charged is in excess of the price set forth in regulation 142?

Mr. Campbell: No, your Honor. The stipulation as I intend it did not go that far because I have always held 142 is invalid and does not establish prices, and they are repugnant one to the other. The prices set forth in the column on [58] Exhibit A to the complaint are, I believe, and I will stipulate, subject to any change which might occur, I mean any clerical error there might be, that the prices as set forth in Exhibit A are those set forth in the tabulated section part of 142.

The Court: All right. That's fair enough. I just want to be sure that the plaintiff is making a *prima facie* case.

Mr. Campbell: I don't want to get myself into stipulating 142 is valid.

The Court: No. I understand your contention relative to 142.

Mr. Campbell: Yes, sir.

The Court: But I want to be sure that the plaintiff is making a *prima facie* case, that's all.

Mr. Dooley: That stipulation is accepted and the plaintiff rests.

Mr. Campbell: May all motions be deferred to the end of all the evidence?

The Court: Yes, and then we know what we are talking about.

Mr. Campbell: Then we will proceed to take the evidence now, your Honor?

The Court: All right.

Mr. Campbell: Mr. Dix, will you take the stand?

BENJAMIN DIX

called as a witness herein by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Just keep your voice up so that everybody can hear you. Will you state again how long you have been engaged in the business of handling used boxes?

A. Since 1947.

Q. Your concern, the Dix Box Company, is a partnership? A. Yes.

Q. What is your exact position there? Are you the manager?

A. You might say that, yes.

Q. Do you handle both the purchase of the boxes which are the subject of your business and their sale?

A. I have access to the purchasing. My brother actually does most of the purchasing.

(Testimony of Benjamin Dix.)

Q. Do you handle the selling?

A. I handle the selling.

Q. Do you supervise the keeping of the records and the other office procedures down there?

A. That's right.

Q. Let me ask you this. Generally speaking, where do you [60] acquire the boxes which are presently sold in your business?

A. We have chain stores that we—grocery stores that we buy from, and we have people that buy boxes and bring them into our yard and resell them to us. Where they get them, I don't know.

Q. You have two types, I take it, of places where you buy, either from people bringing them into your yard to sell them to you in quantity lots, or where you go out and buy them, or they are brought in to you by retail establishments with whom you have some previous contacts, is that correct?

A. Yes, and from other dealers.

Q. And from other dealers? A. Yes.

Q. As necessary, or I presume where a dealer is overstocked with a certain type——

Mr. Dooley: I object. This is rather leading, your Honor.

Mr. Campbell: I was trying to save time.

The Court: It is leading, but we are interested in the facts here and it is preliminary. I will overrule the objection.

Mr. Campbell: Will you read where I was?

(Record read.)

Q. (By Mr. Campbell): ——with a certain type

(Testimony of Benjamin Dix.)

of container, they often sell as between themselves, is that correct? [61] A. Yes.

Q. Let me ask you this, Mr. Dix. Approximately how many are there in Southern California engaged in this particular type of business?

A. About 20 to 25.

Q. Based on your experience, as a matter of fact, the Dix Box Company is one of the larger concerns in that business, is it not?

A. I think so.

Q. Approximately what percentage of the used box industry would you say is represented by the 14 defendants who are here in these cases?

A. The majority.

Mr. Dooley: I object, irrelevant, your Honor. I don't see the relevance.

The Court: Overruled.

Q. (By Mr. Campbell): Could you put it in segments of percentages?

A. I would say about 95 per cent.

Q. 95 per cent of the industry? A. Yes.

Q. You are acquainted, are you not, with Mr. Alvarado, who appeared on the stand?

A. Yes.

Q. He testified, I believe, he operated the Alvarado [62] Box Company. Do you know of your own knowledge whether he operates in the purchase or acquisition of boxes, a company similar to those that the rest of you operate?

A. I would say he is one that operates different than most everybody else.

(Testimony of Benjamin Dix.)

Q. In what respect?

A. Well, I don't know whether he buys or gets his boxes on consignment from the Safeway Stores. His function is primarily to recondition and return the containers to Safeway or to people that Safeway buy their produce from. The majority of his boxes is supposed to go back to Safeway customers.

Q. In other words, based on your observation, his business is primarily with or on behalf of one customer, is that correct? A. Yes.

Q. I take it that the rest of you are dealing generally with—let me be more specific. In your own case, approximately how many sources of boxes that you are buying do you deal with?

A. How many sources?

Q. Yes.

A. How many different accounts?

Q. That you are buying from.

A. Probably 15 or 20.

Q. Roughly, how many accounts do you have that you are [63] selling to?

A. Maybe 300.

Q. When you receive the boxes from the markets or establishments from which you obtain them, they are in varying degrees of condition, are they not? A. That is true.

Q. What do you do with those boxes, speaking generally now, to prepare them for resale?

A. We recondition them so that they will be a sound container.

(Testimony of Benjamin Dix.)

Q. What is embraced in the word "recondition"?

A. Well, where broken, we will replace the boards; where the nails are loose, we will replace the nails; where a mark is on there and we have a specific order from somebody to remove that mark, we will remove the mark.

Q. Are you referring to brand marks that are on the boxes? A. Yes, and labels.

Q. That is, either by a label or sometimes by being stamped or burned into the box, is that true?

A. Yes.

Mr. Dooley: I object as putting words in the witness' mouth, your Honor.

The Court: Overruled.

Q. (By Mr. Campbell): Is that correct? [64]

A. Yes, that is true.

Q. What process do you use to remove the marks which are permanently affixed to the wood?

A. We have a sanding machine and by rubbing the boxes against the revolving disk on the sanding machine, the mark comes off.

Q. In addition to the reconditioning which you have described by way of replacing broken parts of the boxes and your sanding, do you also do cleaning?

A. Cleaning?

Q. Yes, by water or other liquids.

A. No.

Q. They are either sanded or left as is so far as cleaning is concerned?

A. Yes, unless there is refuse, old merchandise,

(Testimony of Benjamin Dix.)

maybe some dust or some debris inside the boxes, and we will remove it by hand.

Q. In preparing those boxes for resale, in addition to any reconditioning which is required, and sanding which may be required, will you state whether or not on occasion it is necessary to do special work with relation to particular uses to which that box may be put?

A. Yes. I mean a lug box probably has 100 different uses and 100 different types of customers, so we will upon request of the customer furnish him a container that is especially [65] adapted for his use.

Q. What does that require, for example?

A. Well, extra labor and extra material.

Q. Would it in some instances require special cleats?

A. Special cleats, narrow cleats, wide cleats.

Q. Special partitions within the boxes?

A. Sometimes they have special slats on the outside, but I don't think inside.

Q. Now, generally speaking, before the Defense Production Act of 1950, that is the Office of Price Stabilization, came into existence, was it your experience in the industry that with respect to any given type of container there existed what might be called a historical difference between the price at which you purchased these boxes before reconditioning and the price which you received on selling?

(Testimony of Benjamin Dix.)

Mr. Dooley: I object, your Honor. I can see no relation to the issue.

The Court: How is this material? What are you trying to establish? I will take judicial knowledge that a fellow who is dealing in merchandise is supposed to sell for more than he pays for it.

Mr. Campbell: Yes, your Honor, and it is deeper than that. I am leading up to the meetings which have previously been referred to with the OPS.

The Court: You are leading up to the meetings? [66]

Mr. Campbell: Yes.

Mr. Dooley: I don't see any relevancy.

The Court: Objection overruled. It may be relevant. I don't know. You may make a motion to strike if it is not connected up.

Q. (By Mr. Campbell): Will you answer?

A. There has always been a definite difference.

Q. Was that a difference in cents per container?

A. Well, it would be cents and it would be percentage-wise, also. Not definitely percentage-wise, but in relation of one figure to the other.

Q. That would depend not only on the type of container, but the type service that was done, would it? A. Yes.

Q. In addition to the services which you have previously described which are done in your industry with respect to these containers, that is to say the repairing and sanding and cleaning where necessary by hand and the placing of special cleats or other matters in connection with those boxes, do

(Testimony of Benjamin Dix.)

you also at a customer's request place new labels on boxes? A. Definitely.

Q. Was a price per container charged for that service? A. Definitely.

Q. Did you also, in connection with the services which you rendered, deliver boxes to the purchaser?

A. On occasion, yes.

Q. When required by the purchaser?

A. Would you repeat the question?

Q. Did you deliver boxes to the customer?

A. For the same prices?

Q. No. Did you make delivery yourself, or was it always a case of a customer coming to your yard and taking delivery? A. We do both ways.

Q. You do it both ways?

A. Whichever way the customer wants.

Q. When delivery was made, was an additional charge made for that delivery? A. Always.

Q. That has always been the practice in the industry? A. Always.

Q. At the time the OPS came into effect, Mr. Dix, it is a fact, is it not, that the period applied for your ceiling prices, was that a period of December 20, 1950, to January 19, 1951?

A. Yes.

Mr. Dooley: I will object again. I don't see the relevancy.

Mr. Campbell: It is a matter of law and it is preliminary.

The Court: Overruled. It is preliminary. He is trying [68] to lead up to something.

(Testimony of Benjamin Dix.)

Q. (By Mr. Campbell): Will you describe, Mr. Dix, the conditions as they prevailed specifically in December, between December 20, 1950, and January 1951, compared to the rest of an average year, that is to say, is that a period of activity in the box business or comparative inactivity?

A. It is a definite period of inactivity.

Q. What is the packing period in the box business when you are handling and selling a large number of boxes?

A. I would say from June to October.

Q. That is true, is it not, because dealing in agricultural containers primarily your season of activity is when the crop is being harvested and packed and sent to market, isn't that correct?

A. Correct.

Q. Could you state in terms percentagewise the activity of your business in the period December 20 to January 19 as compared to your annual business?

A. Do you mean how much business would we do in the months, December 20 to January 20, compared to the month of September or October?

Q. As compared to your peak months.

A. I would say in that month we would probably do about 20-25 per cent or about 75 per cent less business.

The Court: Let me ask you a question. Before the OPS [69] came into existence, did the price of second-hand boxes fluctuate with the season?

The Witness: Yes, definitely.

The Court: In other words, the price of boxes

(Testimony of Benjamin Dix.)

during the harvest was higher than when there was no harvest?

The Witness: Yes, your Honor.

The Court: And will you say that the price was cheaper in December and January than it would be in August and September?

The Witness: Yes, your Honor.

The Court: That was before OPS came into existence?

The Witness: Before OPS came into existence.

Mr. Dooley: Your Honor, I request defendants state what element of the case he is seeking to refute so that the court can know just how to fit this evidence in with the issue in the case.

The Court: I am assuming this fluctuation is related to the whole question of supply and demand. With a big supply and no demand, prices ought to go down.

Mr. Dooley: What issue does that fit in the case?

The Court: This is preliminary. I think I know what the defendant is trying to do.

Mr. Dooley: I will ask the defendant to state what he is trying to get at.

The Court: You let the defendant produce the evidence as [70] he sees fit.

Q. (By Mr. Campbell): During that period before OPS came in and specifically between December 20, 1950, and January 19, 1951, you stated sales were much smaller, is that correct?

A. Correct.

Q. Isn't it a fact that during such a period of

(Testimony of Benjamin Dix.)

inactivity, it has been your experience that the selling price will vary from company to company?

A. Definitely.

Q. If you had a customer, you would sell to him at what price you could get, is that right?

A. That's right.

Q. As a result of that, it is a fact, is it not, Mr. Dix, that you found yourself in the industry using a ceiling price, when it first came in for that period, based on that period where the ceiling prices were different for practically every dealer in town?

A. That is true.

Q. As a result of that, Mr. Dix, I will ask you if you and the other box companies, and specifically those who are represented here, undertook to obtain some relief from Washington, and the establishment of uniform ceiling prices?

A. As soon as our customers told me there was a regulation, we tried that, yes.

Q. As soon as you learned your ceiling price was December [71] to January, is that correct?

A. Yes.

Q. Let me ask you this. Had there been some formal or informal association of box dealers prior to that time?

A. Yes.

Q. Did you in these various efforts to obtain whatever relief you did afterwards obtain for the industry, deal together as a group?

A. Yes.

Q. Having found, as you have related, that there were different ceiling prices as to each of the deal-

(Testimony of Benjamin Dix.)

ers in Los Angeles, I believe you stated you did at that time attempt to obtain assistance from Washington, is that right? A. Yes.

The Court: What do you mean by "that time"? Let's specify the dates, approximately. Was that 1950 or 1951?

Q. (By Mr. Campbell): That was in 1951, Mr. Dix?

A. Yes, when the OPS regulation came out, yes.

Q. In that connection did you and the other box dealers engage in the services of a firm of attorneys here in Los Angeles for the purpose of taking up various matters with Washington?

A. I don't quite understand you.

Q. Did the box association hire some attorneys to represent them in Washington in that connection? [72] A. Prior to OPS or after OPS?

Q. After OPS came in.

A. After OPS came in, we didn't hire—well, wait a minute. After the freeze, we hired the attorney.

Q. That is what I am referring to. After the prices were frozen as of your December to January date, you hired some attorneys, did you not?

A. Yes.

Q. Who were they? A. Snyder & Snyder.

Q. A Los Angeles firm? A. Yes.

Q. As a result of their efforts, did you subsequently receive, under date of June 28, 1951, what was known as Order L-117? A. Yes, we did.

Mr. Campbell: I will offer that in evidence.

(Testimony of Benjamin Dix.)

The Court: Has the District Attorney seen that?

Mr. Campbell: Yes. This was submitted at the pre-trial hearing.

Mr. Dooley: I object to that on the ground it is irrelevant.

The Court: Overruled. It may be received and marked Defendants' Exhibit A. [73]

(The document referred to was received in evidence and marked as Defendants' Exhibit A.)

DEFENDANTS' EXHIBIT "A"

Copy

June 28, 1951

Docket No. GCPR, Sec. 7-31-4

In reply refer to: 2431:1:sl

A.B.C. Crate Company

Los Angeles, California— et al *(See Appendix)

GCPR, Section 7, Order No. L-117

Gentlemen:

Reference is made to your application, filed through Snyder and Snyder, Attorneys at Law, of Beverly Hills, California, dated June 7, 1951, in which you request that the director of Price Stabilization establish ceiling prices for your fruit and vegetable containers under the provisions of Section 7 of the General Ceiling Price Regulation. This regulation authorizes the Director of Price Stabilization to set ceiling prices for a commodity or service when such price cannot be determined under any other section.

Defendants' Exhibit "A"—(Continued)

On the basis of statements made in your application, it appears that you are unable to determine your ceiling prices under any other provision of the regulation. It further appears that your proposed ceiling prices are in line with the level of ceiling prices otherwise established by this regulation. It further appears that delay in establishing ceiling prices for this commodity may cause a delay in supplying growers, packers, shippers and produce commission merchants and thus preventing their shipment of fruits and vegetables to the detriment of the health and welfare of the country.

After due consideration of the foregoing, and pursuant to Section 7 of the General Ceiling Price Regulation,

It is ordered:

(a) That the ceiling price for the sale of fruit and vegetable containers by the A.B.C. Crate Company, Los Angeles, California, et al.* shall be:

- (1) Lugs—12c.
- (2) Three-quarter lugs (Flat)—12c.
- (3) Wirebound Crates—19c.
- (4) Vegetable Crates—25c.
- (5) An additional charge for sanding lug boxes when required—5c per lug.
- (6) Customary place of delivery and customary price differentials to apply.

(b) All provisions of the General Ceiling Price Regulation, except as changed by the pricing provisions of this order, shall remain in full force and effect as far as you are concerned.

Defendants' Exhibit "A"—(Continued)

(c) This order may be amended, modified, or revoked by the Director of Price Stabilization at any time.

A copy of this order has been filed with the Recording Secretary of the Office of Price Stabilization at Washington 25, D. C., where it may be examined by the public.

This order shall be effective immediately.

Very truly yours,

Michael V. DiSalle, Director

/s/ By W. J. Damtoft, Acting Director,
Forest Products Division

* Appendix:

The provisions of this letter order shall also be applicable to the following named applicants who have also supplied the information required by General Ceiling Price Regulation, Section 7:

Acme Crate Company, Dix Box Company, Produce Box & Crate Company, Ace Box & Crate Company, C & S Box Company, Mandell's Crate & Box Company, Simonian Crate Company, Oranessian Crate Company, Ajax Crate Company, Carbal Crate & Box Company, L. A. Box & Crate Company, Pete's Crate & Box Service, United Crate Company, S. E. Bevis, Louie's Crate & Box Company, Star Box & Crate Company, Alvarado Crate Company, Growers Box & Crate Company, Standard Crate Company, Three Brothers Crate Company, Atlas Crate and Box Company, Christie Crate Com-

Defendants' Exhibit "A"—(Continued)

pany, H. M. Hernandex & Sons, Martello Box & Crate Company, Triangle Crate Company, Valley Crate & Box Company.

The Court: When you say you received it, you mean you personally received this?

The Witness: Each company received it.

Q. (By Mr. Campbell): I will show you this Exhibit A. This is addressed to the A. B. C. Crate Company of Los Angeles, California. I will ask you if you received a copy of that communication from the OPS. A. I did.

Q. Mr. Dix, I call your attention to the fact that that order purports to set forth certain ceiling prices expressed in cents for various types of fruit and vegetable containers, and provides further that an additional charge may be made of 5 cents per lug for sanding, and provides further that customary place of delivery and customary price differentials are to apply in the sale of fruit and vegetable containers. Do you recall that? A. Yes, I do.

Q. After you and the other members of the association received this order L-117, did you attempt to the best of your ability to comply with the terms of this order? A. We did.

Q. I believe you previously stated you and the other 13 firms that are represented here represented 90 to 95 per cent [74] of the industry, is that right?

A. That is true.

The Court: May I interrupt a minute? I want to

(Testimony of Benjamin Dix.)

straighten something out, if I can. What is the date of Exhibit 1? That is April 29, 1952. This Exhibit A is dated June 28, 1951.

Mr. Campbell: Yes, your Honor.

The Court: This letter was received prior to Exhibit 1?

Mr. Campbell: 142, yes. 142 purported to replace this order.

The Court: Is the government contending in any way that this is not a valid order, Exhibit A?

Mr. Dooley: The government does not contend that is not a valid order. The government contends that was not in force and effect at the time of the violations complained of.

The Court: That's all right. It is signed by Michael V. DiSalle, Director, and it is sent to each one of the box companies, and you are not contending when that order was signed and sent to these box companies, it didn't become a valid order?

Mr. Dooley: It was valid at the time.

The Court: You are contending this was superseded by another order?

Mr. Dooley: It was superseded by CPR 22.

The Court: It's 12:00 o'clock now. We will now recess until 2:00 o'clock this afternoon. [75]

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.) [76]

The Court: Proceed.

BENJAMIN DIX

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Mr. Dix, just before the noon recess, you testified, I believe, after letter order L-117, which has been admitted as Exhibit A, came into being, that you used your best efforts to comply with the prices as set forth in that order, is that right? A. That is true.

Q. Mr. Dix, based on your personal experience in this business here in the Los Angeles area, what are the types of fruit and vegetable containers that are principally sold by those engaged in that business in this area?

A. Well, I would say it would be lugs, apple boxes, and lettuce crates.

Q. Approximately what percentage of your business consists of those items? [77]

A. Lugs would be the majority. It is awfully hard to say what percentage. I never did figure it out percentagewise. But take away the lugs, apple boxes and lettuce crates and we might as well quit.

Q. That is the backbone of your business, is that correct? A. Yes.

Q. I notice in Order No. 142, which is Plaintiff's Exhibit 1 in this case, there are a number of items

(Testimony of Benjamin Dix.)

referred to as peach flats, avocado flats, strawberry and tomato flats. Do those items constitute any bulk of your business?

A. We don't differentiate between them in that manner. We call a lug a lug and a flat a flat. That is the only two types we would have. Avocado would be a different container altogether.

Q. In your business they are not known as avocado flats?

A. Yes, but we don't have anything called a peach flat.

Mr. Dooley: When the witness says "we," who is he referring to?

Q. (By Mr. Campbell): By "we," are you referring to yourself principally?

A. For myself for sure, and I believe the other fellows.

Q. In the trade generally?

A. I know of nobody that has a peach flat.

Q. Now, I have asked you, Mr. Dix, if you would examine [78] your records as to the ceiling prices of the various commodities which you were handling as established for the period in which prices were frozen originally under the OPS act, that is December 20, 1950, to January 19, 1951. Have you done so?

A. Yes, I have.

Q. And have you listed those on a memorandum?

A. Yes, I have.

Q. Were these taken directly from your books and records?

A. Directly from invoices.

Q. And those invoices are also present in the

(Testimony of Benjamin Dix.)

courtroom in the event counsel desires to examine them, is that correct? A. Yes.

Q. Have you also, in connection with those various commodities and at my request prepared a memorandum from your invoices as to the buying prices of those principal commodities during that same period? A. Yes, I have.

Q. And is this the memorandum which I show you? A. That is the memorandum.

Q. That was also taken from your books and records? A. Right.

Mr. Dooley: Are you offering these?

Mr. Campbell: Yes. [79]

Mr. Dooley: I object, irrelevant, immaterial. It refers to a period that antecedes the period with which we are concerned before this court. I see no relevancy whatsoever.

The Court: Overruled. Defendants' Exhibit B.

Mr. Campbell: May the two documents be admitted as one?

The Court: Yes.

The Clerk: Defendants' Exhibit B.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit B.)

The Court: May I ask this witness a question? What is a wire-bound crate?

The Witness: A wire-bound crate is a container made of wood slats that is bound together and held together by wire.

The Court: Would that include an orange crate?

The Witness: No. An orange box would be held

(Testimony of Benjamin Dix.)

together by nails. One piece would be nailed to the other.

The Court: What kind of crate would be held together by wire?

The Witness: A series of slats that would be bound together as on hinges, only they would use wire instead of nails.

Q. (By Mr. Campbell): And what is the commodity?

A. Principally beans, peas, grapefruit—no, not grapefruit, but peas and beans.

The Court: Did you make any distinction at all as to [80] vegetable crates?

The Witness: And differential?

The Court: Yes.

The Witness: I don't understand the question, your Honor.

The Court: What vegetables do you use in crates, let's put it that way.

The Witness: A vegetable crate is commonly termed as a lettuce crate.

The Court: Would you have any other crate other than lettuce crates?

The Witness: Yes. We would have the lettuce crate, the orange crate.

The Court: Would an orange box be called a crate?

The Witness: I believe so.

The Court: What kind of a container do carrots have?

The Witness: Carrots would come in a lettuce

(Testimony of Benjamin Dix.)

crate, same type container, and also when they cellophane-pack them, they would be in a wire-bound container.

The Court: What kind of container was used for celery?

The Witness: Sometimes a nailed crate, a sturdy crate, or a wire-bound crate.

The Court: Then you really had under this No. L-117, you really had just two kinds of crates, wire-bound crates and vegetable crate?

The Witness: I believe so. [81]

The Court: What did you do about orange boxes?

The Witness: Orange boxes—do you mean by that what did we do about prices?

The Court: No, how would you catalog an orange crate?

The Witness: Your Honor, our business is not that technical where we would care whether it was called a box or a crate. The initial name of lettuce or orange would be sufficient.

The Court: Would you consider an orange box or orange crate in the same category as a lettuce crate?

The Witness: No, sir.

The Court: Would you have any difference in price?

The Witness: Yes. An orange crate would be a definite style and a lettuce crate would be a definite different style.

The Court: You have here wire-bound crates

(Testimony of Benjamin Dix.)

19 cents, and you have vegetable crates 25 cents. How would you classify an orange box?

The Witness: They don't classify orange boxes at all in that respect in that one.

The Court: No, not in L-117.

The Witness: Orange boxes are a minor item, and at the time 117 came out, it was not an important enough item—in other words, the freeze price was probably satisfactory to all concerned at the time and so we didn't look for relief from the freeze price. [82]

The Court: L-117 said vegetable crates 25 cents. Did that include all vegetable crates, regardless of size?

The Witness: Your Honor, for all intents and purposes, a vegetable crate is known in the box industry as a lettuce crate, a crate $24\frac{3}{4}$ inches long——

The Court: I know what a lettuce crate is. But is there any other crate besides a lettuce crate?

The Witness: A lettuce crate would be used for lettuce and cabbage and carrots and green beans, small bunch goods, but an orange crate could not be used where a lettuce crate would be used.

The Court: What kind of crate would you use for celery?

The Witness: It would be a different crate, sturdy crate or a wire-bound crate.

The Court: What was the difference in price under L-117 between a lettuce crate and a crate that you used for celery?

(Testimony of Benjamin Dix.)

The Witness: There was a big difference in price. The lettuce crate makes up a big part of our volume. The celery crate is a very small part.

The Court: Did you sell them for the same price?

The Witness: No, sir.

The Court: What was the difference?

The Witness: Why would there be a difference?

The Court: No. How much was the difference?

The Witness: Oh, from 5 to 7 cents. [83]

The Court: Did you have any melon crates?

The Witness: Yes, sir, we had melon crates.

The Court: What kind of crate was used for melons?

The Witness: Melon crates.

The Court: How does it differ from a lettuce crate?

The Witness: Again in its size and nature of its use, but a melon crate is highly seasonable and at one time of the year it could be worth 25 cents, and 60 cents later. It would be worth numerous prices.

The Court: Would you call a melon crate a vegetable crate?

The Witness: No, sir.

The Court: L-117 had no classification for a melon crate?

The Witness: Because of its nature. A melon crate, regardless of any ceiling, isn't an important enough item where we are concerned about it. It is not essential to our well-being, so it isn't important whether we handle melon crates or not because it

(Testimony of Benjamin Dix.)

is very seasonable. It sells for a couple of months out of the year, and we break them up the rest of the time. We were concerned with L-117 when it came out for release in our essential items.

The Court: And that is what?

The Witness: Lugs, apple boxes and lettuce crates.

The Court: What is an apple box? Is that the box that [84] they send to stores in which the apples are shipped?

The Witness: Yes, your Honor.

The Court: And a lug is something you use out in the field to lug the vegetables in from the field, isn't it?

The Witness: No, sir. A lug is a smaller container used for a smaller type of mostly deciduous fruits, and is used to bring the merchandise into the market. A lug is not used for lugging, but actually used to market produce. I think there is a standard government measure for that.

The Court: Then your business to a great extent was based on lugs, apple boxes and lettuce crates.

The Witness: Yes, your Honor.

The Court: The rest was incidental.

The Witness: Incidental. What we might call necessary evils.

The Court: All right.

Q. (By Mr. Campbell): Mr. Dix, referring to the three periods which are set forth in Order No. 142, did you also examine your records and make

(Testimony of Benjamin Dix.)

a memorandum therefrom as to the price obtained by you for the various types of containers which you sold in such period for the period May 24, 1950, to June 24, 1950; January 25, 1950, to February 24, 1951, and March 29, 1952, to April 29, 1952?

A. I did.

Q. Is that the memorandum which I have in my hand? [85]

A. Yes.

Q. And that was prepared by you from your books and records, is that right?

A. That's right.

Mr. Dooley: The plaintiff objects to this.

The Court: It hasn't been offered as yet.

Mr. Campbell: I offer them now together.

Mr. Dooley: The plaintiff objects on the ground that the period shown is from May 24, 1950, to June 24, 1950, and that is not before the court, and on the further ground that the evidence the defendant seeks to offer could only have any relevancy to the validity of the regulation 142, and this court has no jurisdiction to determine the validity. It would seem that this would be irrelevant and immaterial before this court.

The Court: Objection overruled. It may be received as Defendants' Exhibit C.

The Clerk: Defendants' Exhibit C, so marked.

(The document referred to was received in evidence and marked Defendants' Exhibit C.)

Q. (By Mr. Campbell): Mr. Dix, do you recall when purported order CPR 142 was published and circulated to the members of the box industry?

(Testimony of Benjamin Dix.)

A. Yes, I do.

Q. Do you remember that event?

A. Yes. [86]

Q. A copy of which has been introduced here as Government's Exhibit 1. At that time and immediately after receipt—strike that.

First, did you have any information or had you received any information from any of the officers of OPS that such an order would be issued?

A. No, we had not.

Q. I take it, then, your first knowledge of the 142 was when you received a copy of it, is that correct? A. Yes.

Q. The order itself, which is Exhibit 1 here, is dated April 29, 1952. With that date in mind, do you recall approximately when you first saw this order?

A. I believe it was about two weeks afterwards.

Q. By whom, if anyone, was it called to your attention?

A. We went down to the OPS to find out about it. We had heard such an order was in existence.

Q. But you had not seen it up to that time?

A. No, sir, we had not.

Q. Do you recall whether there was some official of the OPS or someone in the industry that had called your attention to it?

A. One of my customers called me up and told me I was in violation.

Q. Of the then existing order, is that correct?

A. That's right.

(Testimony of Benjamin Dix.)

Q. On that occasion, did you then and other members of the box industry go to the office of the OPS? A. Immediately.

Q. Do you recall more precisely the date of that meeting, the first meeting?

A. I don't recall the date. I know it was after the order had come out, and it was about a week after the order came out. Then I went down and we saw Mr. Hameetman.

Q. Is that Jacob Hameetman?

A. I don't know his first name.

Q. Do you recall his position?

The Court: How do you spell that name?

Mr. Campbell: H-a-m-e-e-t-m-a-n.

The Witness: I am not sure of his exact position.

Q. (By Mr. Campbell): What office was he connected with? A. The OPS office.

Q. Had you met him prior to that time?

A. About a year before.

The Court: May I interrupt just a minute? Where was the OPS office at this time?

The Witness: In downtown Los Angeles. I am sorry, I don't know the exact address.

Q. (By Mr. Campbell): Does this refresh your recollection? Was it at 108 West Sixth Street in the City of Los [88] Angeles?

A. It seems to me that would be it.

Q. On that occasion, who was with you when you went down there after 142 was called to your attention?

(Testimony of Benjamin Dix.)

A. The first occasion I went down by myself. I went down immediately after my customer told me I was in violation to find out what it was all about.

Q. That is the first knowledge you had of any order, is that correct? A. That's right.

Q. Whom did you see on that occasion?

A. Mr. Hameetman.

Q. Was he the only person that you saw?

A. On that occasion, yes.

Q. Did you inquire for Mr. Hameetman when you went to that office? What was the occasion of your meeting him down there?

A. I asked to talk to somebody that had something to do with the wooden box regulation.

The Court: You went into the office and you asked somebody. Whom did you ask?

The Witness: A girl at the desk.

The Court: Information girl?

The Witness: I think so.

The Court: All right. You say you asked for somebody. [89] Did she tell you to see Mr. Hameetman?

Q. (By Mr. Campbell): On that occasion did you have a conversation with Mr. Hameetman?

A. Yes, I did.

Q. Will you relate that conversation?

A. Well, it was a very brief one. He told us that the order had come out.

Q. You say "us." Was there someone with you?

A. I am sorry. He told me that the order had

(Testimony of Benjamin Dix.)

just come out and it was going to be a big help for us because they had given us an 18 per cent increase and he thought I and the rest of the box industry should be very happy about it.

Mr. Dooley: I object to a portion of that as being hearsay.

The Court: If that is what he said, it isn't hearsay. He is testifying to what Mr. Hameetman said.

Mr. Dooley: It is not being introduced for the truth or veracity of the statement.

The Court: That doesn't make any difference. This is the testimony of what was said by Mr. Hameetman. The objection is overruled.

The Witness: At that time he told me that it was impossible——

The Court: Just a minute. Did he give you a copy of the regulation then? [90]

The Witness: No, your Honor, he did not.

The Court: Did he show you a copy?

The Witness: He showed me a copy.

The Court: All right.

Q. (By Mr. Campbell): Did you read the regulation on that occasion?

A. I read the regulation then, yes.

Q. Relate the further conversation you had with Mr. Hameetman.

A. I looked at the prices and I told him it was impossible to go along with such a thing. I said, "We are better off to close up because it is impossible to operate."

(Testimony of Benjamin Dix.)

Q. Did you tell him why?

A. He asked me, "How do you know it is impossible? You haven't tried it."

I said, "It isn't necessary to try it. I know what my costs of operating are. I know I can't operate at an increased buying price and a lower selling price and still pay my bills."

Q. Were the prices on 142 less than the prices which you were selling at under 117 as to the larger items?

A. The selling prices were higher and the buying prices were higher.

Q. By buying prices, are you referring to the prices set for the retailers? [91]

A. That's right.

Mr. Dooley: I object. The regulations speak for themselves.

The Court: Your objection is good. In 142, where is the buying price?

Mr. Campbell: In this table, your Honor, the price listed as retailer is the ceiling price set at which the dealers buy from the retailers who are defined as the markets and others from whom they secure the boxes.

The Court: In other words, this regulation not only attempted to set the price the dealer could sell for, but also the price he could buy for?

Mr. Campbell: Correct, your Honor. That is the very point the witness was making to Mr. Hameetman at that time, apparently.

The Court: I am just wondering. I guess it has

(Testimony of Benjamin Dix.)

been established that the government had a right to set a ceiling price on commodities. They could say to a person, "You cannot sell over a certain price," and I suppose, also, the government had a right to tell a buyer, "You cannot buy over a certain price."

Mr. Dooley: May I say something in that connection? This evidence is being introduced and we haven't discussed or argued the question that was placed in my memorandum, and it was also raised in the defendants' memorandum, as to whether this [92] court has jurisdiction to determine the validity.

The Court: I understand that. Let's get the facts and then we can argue the legal points.

Mr. Campbell: That is what I had in mind, your Honor.

The Court: I remember a case I tried some time ago relative to the ceiling price of a machine tool, and it seems to me the regulation in that case set forth that the buyer was just as much at fault as the seller, and the buyer was responsible if he violated the law just as much as the seller. This regulation attempts to establish the price that the retailer, the individual, could sell to the wholesaler.

All right, you can proceed. I just wanted to be sure I understood.

Q. (By Mr. Campbell): Will you proceed with your conversation with Mr. Hameetman? You had gotten to the point where he had shown you for the first time this regulation 142 and you had stated,

(Testimony of Benjamin Dix.)

I believe, it was impossible for you to operate under these prices because the price at which you could sell was lower than the price at which you could buy, is that correct?

A. That is correct.

Q. Proceed with what was said on that occasion.

A. The first occasion, there wasn't very much.

Q. All I want at this time is the first time you were there with Mr. Hameetman. [93]

A. I asked him if I could have an order and he said they were in the process of mailing the orders and they had them all laid out on the desk.

Q. 142, this order which is here as Government's Exhibit 1?

A. That's right. He said they were in the process of mailing them and we would get them in the normal course of mailing, and the government wasn't to go ahead until we had gotten the order and had a chance to look at it.

Q. That was the substance of the conversation?

A. That was the substance of the conversation.

Q. Did you subsequently return to the office of the OPS after you and, I presume, the other box dealers, had received copies of 142?

A. On several occasions.

Q. When was the next occasion? Was there an occasion upon which you and a committee from the box dealers went to the office?

A. Yes. I wouldn't be able to say the amount of days. It wasn't long after that, just several days or a few days at most.

(Testimony of Benjamin Dix.)

Q. Would you say it was by the middle of May?

A. By that time.

Q. By that time? A. Yes. [94]

Q. Were there any delays at all after you received this order and—from the time you were first aware of this order, were there any delays in meeting with OPS officials?

A. No. We did it as soon as an appointment could be arranged.

Q. When you say “we,” you are referring to the other box dealers?

A. A committee from the association.

Q. The association appointed a committee?

A. That’s right.

Q. Who was on that committee?

A. If I remember correctly, there was myself, Mr. Ginsberg——

Q. The gentleman here at the counsel table with me?

A. Yes, of the Star Box, Standard Crate, and Acme Crate, if I remember correctly.

The Court: How many all together?

The Witness: I believe five of us.

Q. (By Mr. Campbell): Did you and this committee then after having made some appointment, proceed to the offices of the OPS?

A. Yes, we did.

Q. That was by the middle of May?

A. Yes.

Q. To the best of your recollection? [95]

A. Yes.

(Testimony of Benjamin Dix.)

Q. Did you make any note of the day at that time? A. No.

Q. Who, if anyone, did you meet with there at the OPS office?

A. I think the first meeting was with Mr. Hammetman and Mr. Wilson.

Q. Are either of those gentlemen in the court room? A. Mr. Wilson is here.

Mr. Campbell: Will you please stand up?

Q. Is that the gentleman to whom you refer?

A. Yes.

Q. Was anyone else present on that occasion?

A. I don't remember whether Mr. Murray was there on the first or second meeting.

Q. By Mr. Murray, you are referring to an attorney for the OPS who was present here this morning? A. That's right.

Q. You say you don't recall if he was there the first meeting?

A. I don't remember if he was there the first or second.

Q. Do you recall of anyone else being present besides those you have enumerated?

A. There was one other, I am not sure whether she was on the first or second. That was a Miss—I can't think of [96] her name right now.

Q. Do you remember what her capacity was with the OPS? Was she an economist?

A. Yes, an economist.

Q. May I ask if this refreshes your recollection? Was her name Lavine, L-a-v-i-n-e, or Isabel Grant?

(Testimony of Benjamin Dix.)

A. Miss Lavine.

Q. Do you remember an Isabel Grant at any of these conferences? A. Not right now.

Q. Do you recall what Mr. Wilson's capacity was? You have identified Mr. Murray as an attorney.

A. I believe Mr. Wilson was head of the local office.

Q. What part of the office?

A. The local OPS office.

Q. Will you relate what occurred on that occasion?

A. On that occasion, we had opportunity to go through their——

Q. Before you went there?

A. Yes. We had opportunity to go through the regulation and it was impossible to operate any box business under——

Q. We want your conversation. Is that the conversation? Tell us what you told them and what they said.

A. We told them that, and there were several conversations. I can't remember which came in which order, but the [97] gist of the conversation was that the order had originated—no, originally they told us we had recourse to file certain documents, certain graphs, certain charts and different kinds of briefs that none of us in the box business were competent or able to do or understand how to do.

We asked them, seeing as how we were not set

(Testimony of Benjamin Dix.)

up to do any of those things, would they assist us?

They did offer to assist us, and during the course of time, they had their auditors or bookkeepers go through our books and records.

Q. Let me ask you this before we go further. You and the committee had several meetings with these people, did you not?

A. Several meetings.

Q. That was over the course of a few days, or did they extend over some time?

A. They were stretched out as well as could be managed.

Q. And what period would you say?

A. I believe we had meetings with the OPS until the bitter end, until the opposition went out of business.

Q. From then until January 1953, is that correct? A. Yes.

Q. How often would those meetings occur?

A. Well, there would be a meeting after each had been required to do something, and they would be in the process of [98] doing something, so we would meet before they did something and even something was supposed to be done.

Q. Was information asked from you?

A. Information in the way of making records available to their bookkeepers.

Q. Which you had gotten together for them?

A. Yes.

Q. Was the committee from the box companies the same all the time? A. Yes.

(Testimony of Benjamin Dix.)

Q. The same group would meet each time?

A. Yes.

Q. On each of the occasions, would the OPS officials be the same or would they change from time to time?

A. Just about the same.

Q. You were asked to gather together at that time, you say, certain graphs and charts which you stated to them you were unable to do, and they said they would assist you in doing it; that was your testimony?

A. Yes.

Mr. Campbell: I will ask at this time if the United States Attorney will produce, as has heretofore been requested of him, and which I think he has, an economics study, a memorandum made by Mr. Hameetman of the OPS with relation to the pricing of 142, which contains a comparison of the buying and [99] selling prices as they existed under prior regulations, prior to the regulations themselves.

Mr. Dooley: The United States Attorney will produce that. However, the United States Attorney will object to its admission on the ground that it irrelevant to any issue before this court, and on the further ground it is hearsay and——

Mr. Campbell: As to the last ground, the document which you are producing is an official document from the files and records of the OPS, is that correct?

Mr. Dooley: I wouldn't say that. It was a letter written by one person to another. It is in our files.

(Testimony of Benjamin Dix.)

I probably should object on the ground that it is confidential, also.

The Court: I don't see how it could be confidential. It is always necessary to produce if it comes from the file, and if it is kept in the ordinary course of business, it is admissible without any further foundation.

Mr. Dooley: I will object on the ground of its irrelevancy.

The Court: Objection overruled. What I want is the facts in this case. I don't want to decide this case upon a technicality. I want to know what the facts are.

Mr. Dooley: Yes, your Honor.

The Court: If I want to decide this case on a technicality, I might have granted the defendants' motion.

Mr. Campbell: I will renew it, your Honor. [100]

Mr. Dooley: I am not trying to keep the facts away from the court, your Honor. The objection I raise is on the question of validity, and we will discuss that later.

The Court: Well, let's get the facts in and then we can discuss the import of those letters, and it may be that they are immaterial and have nothing to do with this case, but I don't know now.

Mr. Campbell: This document which I will identify for the record, I now wish to offer in evidence as Defendants' exhibit next in order. It is an office memorandum, United States Government, dated February 26, 1953, addressed to James E. Harring-

(Testimony of Benjamin Dix.)

ton, District Enforcement Director, Los Angeles District, from Chester D. Lewis, District Accounting Executive, by Leslie E. Johnson, Cost Accountant, to which is attached a document entitled "Analysis of Costs and Sales of Agricultural Wood Containers to Dealers, Office of Price Stabilization, Los Angeles District Office," which, as I recall, was the work of Mr. Hameetman.

Is that correct, Mr. Dooley?

Mr. Dooley: I don't know. The document will speak for itself.

The Court: It may be received and marked Defendants' Exhibit D.

The Clerk: Defendants' Exhibit D in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit D.)

Q. (By Mr. Campbell): You say during the course of these conversations that you and your committee members had with the officials of the OPS, you discussed the fact that it was impossible for you to continue business under the prices as set forth in 142, is that correct?

A. That's right.

Q. What did they say about that?

A. Well, there wasn't too much importance laid to it. They told us——

The Court: That is not the question.

Q. (By Mr. Campbell): What was said?

The Court: The question is, what did they say?

(Testimony of Benjamin Dix.)

The Witness: The attitude was——

Q. (By Mr. Campbell): No, not their attitude. You understand, we are interested in what they said and what you said. If you can't remember the exact words, the substance of what was said, wherever possible, and state who said it.

A. Mr. Wilson said not to worry about it, there wasn't enough handcuffs to put us all in jail, they wasn't going to put us in jail, and they would see what they could do about getting it straightened out for us.

Q. Was there anything said on that occasion about your engaging attorneys for that purpose?

A. No.

Q. On any of the occasions that you discussed the matter with them?

A. Did they say we should engage attorneys?

Q. I am asking if anything was said on that subject. A. No.

Q. Did your people say anything on that subject?

A. I believe we asked if it was necessary to engage an attorney, and Mr. Murray said that the order originated in Los Angeles and could be changed in Los Angeles, but that the regional headquarters was in San Francisco and it would have to go through San Francisco, but they would start it from this point.

Q. Who would start it from here?

A. The OPS would start relief for us from the

(Testimony of Benjamin Dix.)

Los Angeles office to the San Francisco regional headquarters.

Q. Was anything said on the occasion of your meetings there on the subject of whether you should continue operations under Order L-117, rather than the prices set forth in 142?

A. Well, I believe I was the one that told Mr. Wilson that I could not operate on that basis.

Q. On the basis of what?

A. On the basis of 142, and I had either to close my doors or violate the regulation. Mr. Wilson told me not to worry about it, there would be help coming pretty quick. [103]

Q. Was anything said about your continuing under L-117? Did either you or he say anything about it?

A. He didn't say to continue, but they didn't say not to continue. They said not to worry about it, help would be coming.

Q. Was anything said by you about continuing under 117?

A. I told him I had to either continue under 117 or close up, because I did not have enough cash available to operate at a loss for any period of time.

Q. And you were told not to worry about it, is that correct?

A. Yes.

Q. That help would be forthcoming?

A. Yes.

Q. Did you believe in good faith at that time that these officials would do something to concerning that?

A. Yes, I did.

(Testimony of Benjamin Dix.)

Q. Did you then continue to operate under Order L-117? A. Yes, I did.

Q. Did you from then on throughout the period OPS was in effect, that is to say, until the month of January 1953, continue to cooperate with the Office of Price Stabilization and make your records available, supplying them with such information as they required? [104] A. I did, yes.

Q. Did you alter any of your records so as not to show the correct price at which products were sold? A. No, I did not.

Q. Or the parties to whom they were sold?

A. No, I did not.

Q. As a result of your meetings with the Office of Price Stabilization, did you believe that you were acting properly and within the law in continuing to utilize the prices as set forth in Order L-117? A. Yes, we sincerely did.

Mr. Dooley: I object. He says "we." To whom do you refer?

Mr. Campbell: He uses it editorially.

The Court: You are referring to your company?

The Witness: To my company.

Q. (By Mr. Campbell): So far as you know, the other box companies—may I ask this? Incidentally, in this business, it is a very competitive business, is it not? A. Very much so.

Q. Most of you are operating around the market area? A. That's right.

Q. Isn't it a fact that you know what your

(Testimony of Benjamin Dix.)

competitors are doing just about the same time they do the act?

A. Sometimes before. [105]

Q. Your customers all know what the going prices are, don't they? A. Yes.

Q. Then to your knowledge were the other members of the association whom you have testified represented about 90 to 95 per cent of the industry, were they all proceeding on the same price schedules? A. Everybody was, yes.

Mr. Dooley: I object to him testifying as to the others.

The Court: That may go out, as to what the others were doing.

Mr. Campbell: Except, your Honor, he has testified he is very well acquainted with that.

The Court: That may be true. I am very well acquainted with what attorneys do, but I don't know what you do. I know what you are supposed to do.

May I inquire of counsel, is Exhibit 1, Regulation 142, the first printed regulation there was?

Mr. Campbell: That is my understanding.

Q. This 142 is the first printed regulation you received? A. Yes, aside from L-117.

The Court: L-117 was a letter.

The Witness: Was a letter, yes.

The Court: There are just two regulations, L-117 and 142? [106]

The Witness: To my understanding—

Mr. Campbell: There was a general freeze originally, a freeze of the original prices they had

(Testimony of Benjamin Dix.)

December 20 to January 19. These people appealed from that, hired attorneys, and got 117. This is the first printed order that came off the government printing press.

Mr. Dooley: What is that, counsel?

Mr. Campbell: 142.

Mr. Dooley: The general ceiling price regulation.

Mr. Campbell: I say aside from the general ceiling price regulation.

The Court: Let me ask something of counsel. Under the regulations when you attempt to establish the ceiling prices, would they be established arbitrarily, or did you have to have meetings and some kind of agreement between the parties as to ceiling prices?

Mr. Campbell: I understand various situations arose. Generally speaking, in an industry ceilings were frozen as of a particular day, a period prior to the OPS. But necessarily, just as in this industry, it often resulted in inequities as between those competing in the same territory, because they had different prices, depending upon the law of supply and demand as it existed at that time, and under such circumstances the industry could petition the President or his representative, the OPS, who would then, on the basis of study set general [107] price ceilings, which was done in this instance in 117. It is a small industry.

The Court: 117 is kind of a stop-gap order. It doesn't try to distinguish between the different

(Testimony of Benjamin Dix.)

kinds of lugs and crates. It sets forth only four classifications, lugs, three-quarter lugs, wire-bound crates, and vegetable crates. That is only a temporary order. That is a stop-gap order until they can determine what the ceiling prices ought to be. I am wondering this. Could they determine arbitrarily what the ceiling price is going to be?

I notice in Exhibit D we find this statement: "Prices as fixed by CPR-142. There is no data in the files to determine how these grades were fixed. No such base period practice was found."

Could they set a figure without some basis? Was it possible for the OPS to arbitrarily say to these people, "Regardless of what they cost, you can only sell for a certain amount," without any hearing, without giving the sellers the right to appear and protest?

Mr. Campbell: We say not, your Honor.

Mr. Dooley: Well, your Honor——

The Court: Just a minute. I am arguing with Mr. Campbell now.

Mr. Campbell: Our position is this, as previously indicated by this witness here, that the backbone of the industry [108] consisted of certain items which they have taken up with Washington and which were covered under 117.

The Court: L-117 didn't cover the items——

Mr. Campbell: The principal items.

The Court: It didn't say a thing about apple boxes, and this witness has testified that is part of the backbone. It never mentioned apple boxes at

(Testimony of Benjamin Dix.)

all. He said the business depended upon lugs, apple boxes, and lettuce crates.

Mr. Campbell: That is true.

The Court: So they did not say anything about apple boxes.

Mr. Campbell: But there were certain competitive items. I have offered in evidence here what the prices were that they had been obtaining for those.

The Court: Well, that is true. I assume, I don't know, I assume that different prices would be charged for different kinds of lugs.

The Witness: I could clear that up, your Honor.

The Court: You say you can clear it up. All right, you clear it up.

The Witness: Apple boxes are in season at that time of the year. During the month of December and January, apple boxes—well, it is probably an item that keeps us in business and is bringing its price, an equitable price to the dealer, and so we were getting a fair price for our commodity [109] for the apple boxes at that time. We applied for relief from Washington on those items that were major backbone items which were out of season during the freeze time and the freeze period caught us with a low price, so we applied for relief on those low price items, but if the item was in season and bringing a price, there was no concern to ask for more money because we were satisfied.

Q. (By Mr. Campbell): In other words, you were satisfied with the freeze price on apple boxes?

(Testimony of Benjamin Dix.)

A. Yes, we were.

Q. Which is not specifically covered under L-117, but is covered under the general freeze?

A. Yes.

The Court: Do you remember what the freeze price on apple boxes was?

Mr. Campbell: That is in Exhibit B or C.

The Witness: I believe it was 12 cents.

The Court: 12 cents?

The Witness: I believe so.

The Court: I notice in Exhibit D apple boxes are set at 13 cents.

Mr. Campbell: May I answer that for your Honor?

The Court: Yes. Do you think I am looking at the wrong thing? I may be. I was looking under the column that is designated 142. [110]

Mr. Dooley: May I point out, your Honor, under the general ceiling regulation, the price, the maximum price varied with each particular concern, depending on how the concern sold goods during the base period. This is more or less an average that was drawn up by someone. It is not clear, but this particular document more or less gives an average or base period price. The general ceiling did not set dollars and cents figures, sir. It depended on how this particular dealer sold during the base period.

The Court: Will you tell me one other thing? How long after the fixing of the ceiling price did 142 come out?

(Testimony of Benjamin Dix.)

Mr. Dooley: I imagine about a year and a half.

Mr. Campbell: It is over a year, yes, your Honor.

Mr. Dooley: The general ceiling price came out in 1950-1951.

The Court: In other words, they operated under L-117—

Mr. Dooley: L-117 came out in June 1951. They operated from June 1951 up until May 1952 under L-117.

The Court: That is, they operated for a year, approximately a year?

Mr. Dooley: Practically a year.

The Court: Under 117?

Mr. Campbell: That's right. Let me point out, your Honor, this table shows with relation to apple boxes that they got a price of 13 cents, as compared with 12 cents, if [111] they show an average price, which this man showed he was charging in that period. But they also raised the purchase from 5.3 cents to 8 cents, so that they show a cost increase to the buyer of 2.7, and actually a net price decrease of .003, not an increase.

The Court: My understanding is the complaint of this witness is that it is not a question that they limit the selling price, but they raise the buying price.

Mr. Campbell: On that item.

The Court: So that the spread was much smaller.

Mr. Campbell: On some items they lowered the selling price. On some items they raised the buying price. An examination will show that the only

(Testimony of Benjamin Dix.)

net price increase on their own analysis was with respect to strawberry trays, and the part of their business that is strawberry trays——

The Court: Is minute?

Mr. Campbell: Is minute. There are two items that were increased, strawberry trays and orange crates, which were increased by 3.33, but there is one item that was decreased as much as $33\frac{1}{3}$ per cent percentagewise, and the overall picture shows that overall of the boxes and crates, with the exception of those two items, the percentage of the dealer was actually lowered in lieu of the 18 per cent raise which the Act purports to give. That is the meat of the argument of these people as to why they couldn't comply with 142, why they [112] couldn't stay in business if they did.

The Court: I was just looking at 142.

“This regulation establishes dealers' ceiling prices at a level approximately 18 per cent above the projected GCPR base period price level.”

They are talking about the dealers' ceiling price. They don't say anything about the retailers' price to the dealer. They don't say whether they are going to raise that 18 per cent, lower it, or leave it the same. All they were trying to do is to fix a price approximately 18 per cent above the base price.

Mr. Campbell: And they had not done that, your Honor.

The Court: The level of ceiling prices for re-

(Testimony of Benjamin Dix.)

tailers was then set to reflect historical differences between retailers' and dealers' prices.

Mr. Campbell: We say they have not done that because they have narrowed the historical difference.

The Court: "The increase over the GCPR base period prices was necessary since December and January are off season in the produce-growing period and prices for used fruit and vegetable containers are at a seasonally low level * * *

"In formulating this regulation, the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under [113] the circumstances and has given consideration to their recommendations."

Q. (By Mr. Campbell): Mr. Dix, were you or to your knowledge any members of the dealers industry consulted by the representatives of the OPS?

A. No, sir.

Mr. Dooley: I object, not only on the relevancy but on the ground that he can only testify as to himself.

Mr. Campbell: I asked as to his knowledge.

The Court: Overruled.

Q. (By Mr. Campbell): What was the answer?

A. They never consulted me and I asked the other dealers——

The Court: You can just say they did not consult with you.

The Witness: All right.

(Testimony of Benjamin Dix.)

The Court: And as far as you know, of your own knowledge, they did not consult with any other dealer?

The Witness: That is true, your Honor.

Mr. Campbell: As your Honor is aware, on this matter of the freeze period, there are comparative prices set forth here, and they were the high prices. In column (f), for example, they give base period high, as they call it, and avocado flats were at 9 cents, and in 142 they are set at 7 cents, a reduction of 2 cents. Under order 117, according to the OPS figures, [114] they were set at 12.

The next item is strawberry trays. That is the one in which there is a raise. The base period high was 4½ cents, and under 142 they are set at 7 cents, which is an infinitesimal item.

The Court: Well, the record speaks for itself.

Mr. Campbell: Yes, it does.

The Court: Let me ask you another question.

Mr. Campbell: Yes.

The Court: Supposing I would come to the conclusion after hearing all the evidence that this was an arbitrary fixing of the prices by the OPS, that the OPS had not consulted with representatives of the industry, they hadn't consulted with anybody, they just arbitrarily fixed these prices. Can I do anything about it?

Mr. Campbell: I think so. Mr. Dooley does not agree.

The Court: Where is your authority?

Mr. Campbell: It is true that the Act provides

(Testimony of Benjamin Dix.)

that the Court of Emergency Appeals and the Supreme Court shall have the power to determine the validity of the Act, nevertheless, I have quoted a case in my memorandum that this court is being called upon to enforce the regulation and has a right to interpret the regulation whether it is determining its validity or not. Where one portion of the regulation is repugnant to the other portion of the regulation, I think the court has the [115] right to determine that.

The Court: Suppose I would say I don't know what they want to do, they say in one place they want to raise 18 per cent, and in another place they don't do it. So I don't know just what they did. Have I any right to throw out the regulation because I don't understand it?

Mr. Campbell: I think your Honor has in an attack of this kind. The cases the United States Attorney is relying on are cases that came into this court when the order was in effect and there they asked the court to prevent by injunction the enforcement, and the court said, "We don't have that power. The Act doesn't give us the power. It is vested exclusively in the Court of Emergency Appeals and in the Supreme Court. That is where you are going to have to go because that is set up for you." But here we have a situation where this court is asked to enforce the provisions of this 142, and I say, first, it is invalid and the court has the power because——

(Testimony of Benjamin Dix.)

The Court: Can you show me where any court has assumed the power?

Mr. Campbell: No, sir, and I can't show you where the court has refused to assume that power directly.

The Court: Do you mean to say this question has never been raised before? It seems unbelievable to me that it wouldn't have been raised. [116]

Mr. Campbell: Not directly, because we have then the further situation where we say that the defendants in this case were deprived or misled from exercising what they should have done at that time under the terms of the Act, to make a direct attack. However, I understood these matters were going to be passed on.

The Court: I was just wondering what your point of view was. I notice it's 3:00 o'clock. We will now recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Campbell): Mr. Dix, during the time L-117 was in effect and prior to April 29, 1952, when 142 was purportedly put into effect, were there any changes—strike that.

Prior to the purported effective date of regulation 142, namely, April 29, 1952, had there been any change in the wage scales which you were compelled to pay your employees in your business?

A. Just about that time we were negotiating with the union for a new contract.

(Testimony of Benjamin Dix.)

Q. At that time were all of your employees under union contract?

A. They were, and we told the union we couldn't negotiate with them because on the basis of the new regulation, we not only couldn't give them any increase, but we couldn't continue [117] to operate.

Q. If 142 was to become effective?

A. Yes, if 142 was to become effective.

Q. Did you, however, as a result of your meetings with the officers of the OPS grant certain increases? A. Yes, we did.

Q. Was that under the belief that 142 was not to be effective and you were to be restored to L-117?

A. That's right.

Q. What was the amount of those increases, do you recall?

A. There was a couple of holidays added in and there was an hourly raise for the truck drivers and the yard workers.

Q. As of the period of time of the price regulation freeze, that is to say December 1950 to January 19, 1951, at that time had you been paying overtime to your employees, do you recall?

A. 1950? I don't recall.

Q. When was your industry first unionized, do you recall that? A. About 1950.

Q. Approximately how many men are employed by you, Mr. Dix?

A. During the season about 50.

Q. During this period of time and immediately prior to [118] the regulation 142, were any rate

(Testimony of Benjamin Dix.)

differentials brought into effect regarding the cost of hauling, that is to say, truck drivers?

A. After the increase in wages?

Q. Prior to 142, immediately prior to 142, aside from your yard employees.

A. The contract came into being right after 142 was issued.

Q. Did that also increase the truck drivers' rate? A. Yes, it did.

Q. From the time of the freeze, that is to say, December 1950, until when 142 came into being, had there been other increases in wages?

A. Yes.

Q. Were any of those increases, to your knowledge, given effect in the prices purportedly set forth in 142? A. I don't quite understand.

Q. I will withdraw the question. At the time or prior to April 29, 1952, the date of regulation 142, you stated, I believe, nobody from the OPS discussed with you proposed changes in the ceiling price, is that right? A. That's right.

Q. Do you know whether or not anyone from that office inspected your records, particularly your invoices of sales to customers? [119]

A. Nobody had.

Q. Do you know whether or not anyone had examined your records with relation to profit and loss accruing from your business?

A. Prior to the regulation?

Q. Yes. A. No, they did not.

Q. Immediately after this 142 came into effect

(Testimony of Benjamin Dix.)

and in the course of your conversations with the officers of the Office of Price Stabilization, did you offer to make available to them all of your books and records, including your income tax returns, for the purpose of showing the profit and loss from such business? A. We did.

Q. Did they avail themselves of that opportunity? A. They did.

Q. This was during the period of time that you stated that they advised you relief would be forthcoming from this order? A. That's right.

Q. Was anything said in the course of these conversations that you recall relative to your engaging attorneys for the purpose of going to Washington in connection with order No. 142?

A. We were going—at one of the OPS meetings, we asked [120] if that was necessary or advisable.

Q. This was after 142 came out in published form?

A. Yes. We asked was it necessary or advisable to hire an attorney to get some relief. We were told that the order originated here in Los Angeles and could be fixed or the necessary changes made here in Los Angeles without going to Washington.

Q. And you believed in good faith that those changes would be made? A. We did.

Q. As I take it, you openly, notoriously, and without any concealment continued to utilize the prices set forth in L-117 and in the original freeze where L-117 did not apply?

A. Yes, we did.

(Testimony of Benjamin Dix.)

Mr. Campbell: You may cross examine.

The Court: May I ask a question here before you cross examine?

Mr. Campbell: Yes.

The Court: Regulation 142 is dated 1952. Were all the sales as set forth in the complaint in 1952 and 1953?

Mr. Dooley: Yes, your Honor.

The Court: May I ask this witness a question? This case was filed May 1, 1953. Were you told at any time before this case was being filed that you were going to be prosecuted for the violation of the regulation 142? [121]

The Witness: No, we were not.

The Court: You had no notice at all?

The Witness: I don't believe so.

The Court: All right. Cross examine.

Mr. Dooley: Your Honor, for the purpose of the record I would like to make a motion to strike all of the testimony prior to May 5, 1952, and all of the testimony pertaining to the validity of the regulation, including the wages paid and the increases in prices for hauling and the testimony going to the yards.

The Court: Your motion is denied. But let me ask you a question, Mr. Dooley.

Mr. Dooley: Yes, your Honor.

The Court: It is a fundamental proposition, as set forth in our Constitution, that a person's property cannot be taken away from him without due process of law.

(Testimony of Benjamin Dix.)

Mr. Dooley: Yes, your Honor.

The Court: Suppose this was an arbitrary action on the part of the OPS and they couldn't operate under this schedule. Wouldn't it be taking away their property?

Mr. Dooley: Well, it may be, your Honor. There is a provision by which the defendants could have, before this suit, and may still after this suit, pursue. Congress has seen fit to set up a special court for the purpose of determining the validity of an OPS regulation. There were three reasons why [122] they did that, two of which are still in existence today.

The Court: Let me ask you another question, Mr. Dooley. OPS is out of existence?

Mr. Dooley: Yes.

The Court: These ceiling prices are out, aren't they?

Mr. Dooley: Yes.

The Court: You are not trying to impress upon the dealers of second-hand boxes that they have to comply with these rules and regulations?

Mr. Dooley: No.

The Court: You are only trying to get the court to grant you a judgment for the so-called over-ceiling prices. It seems to me the solution of this case, if you have any violation at all, it is a technical violation, and so it seems to me you should be willing to accept a nominal payment from the defendants and get rid of the cases.

Mr. Dooley: But the Emergency Court of Ap-

(Testimony of Benjamin Dix.)

peals was set up for one reason because Congress felt persons would be expert in dealing with this——

The Court: Mr. Dooley, I am looking at this from a practical standpoint. Suppose I would go ahead and hold with you, that you are entitled to judgment. It means an appeal to the Circuit. Suppose I didn't hold with you and held with the defendants. That may mean an appeal to the Circuit.

Mr. Dooley: It may. [123]

The Court: You are only fighting for the principle of the thing here. It is not the money involved.

Mr. Dooley: If they have a defense that concerns the validity, the Emergency Court of Appeals was set up for that purpose.

The Court: I wish you would forget the Emergency Court of Appeals for a while. I think the proper solution of this case would be agree to a nominal judgment. They can't violate the law any more. If they are guilty at all, they are guilty of a technical violation.

Mr. Campbell: That was offered, your Honor.

Mr. Dooley: It is within your Honor's power to grant here treble damages.

The Court: Suppose I find these defendants guilty and grant a judgment for \$1.00 in each case?

Mr. Dooley: I don't think that is permitted by the regulation, your Honor. The way the plaintiff views it, it is a question of when——

The Court: These cases many, many times, Mr.

(Testimony of Benjamin Dix.)

Dooley have been settled by an agreement between the parties. Not so long ago Judge Harrison had one of these cases involving sales of automobiles. They weren't tried. They were adjusted between the parties. If these defendants are guilty at all, they are guilty of a technical violation. I am certainly not going to be hard on them. If I find them guilty, I am not going to be [124] hard on them. Why not make some settlement with them?

Mr. Dooley: Of course, a settlement would have to be approved by Washington as far as the plaintiff is concerned.

The Court: What's that?

Mr. Dooley: Any offered settlement by the plaintiffs will have to be approved by Washington.

The Court: If I make a judgment, it won't have to be approved by Washington. Washington won't have anything to say about it at all.

Mr. Dooley: But I was wondering if it is within the court's discretion to refuse to give treble damages.

The Court: It is within the court's discretion to refuse to give any judgment at all.

Mr. Dooley: I don't think so.

The Court: Can't I find for the defendants in this case? If I can't find for the defendants, what is the use of proceeding with the case?

Mr. Dooley: It is not a matter of the plaintiff not wanting the defendants to have their proper remedy. The plaintiff is merely saying that their

(Testimony of Benjamin Dix.)

proper remedy is with the Emergency Court of Appeals.

The Court: You want to get the Emergency Court of Appeals in this case.

Mr. Dooley: Congress set up that court for the purpose of determining the validity. The validity, as you see from [125] the various figures the defendant has brought in, is a maze of economics that requires an expert body that through the years has determined the validity of these regulations.

The Court: But we have before us at the present time, of course the exhibit was admitted over your objection, but we have before us a statement, it is an inter-office memorandum, it is true, to Mr. Harrington, the District Enforcement Director, and they say there is no data in the files to determine how these grades were fixed.

Mr. Dooley: I have asked Washington for more evidence, and they said since the question could not be raised here, there was no point about getting this.

The Court: You tell Washington they better come out to try the case then.

Mr. Dooley: When it was submitted, certain statistical data went along with it, according to my understanding. I think before deciding the question all the facts should be before the court. The plaintiff felt that the authorities were sufficient to show that this is not a question before this court. This court cannot consider the validity. It involves facts and figures and the various data that should be

(Testimony of Benjamin Dix.)

gathered so that the court can consider it. I don't think all the facts and figures are before the court.

The Court: Probably not. You probably have some facts and figures you want to present to the court. [126]

Mr. Dooley: I don't have any I want to present.

The Court: Let's proceed.

Mr. Dooley: All the facts and figures are not available. Some are in storage. If the question of validity arises, all those figures will be gathered together and presented to the Emergency Court of Appeals. If a judgment is rendered here, the judgment will automatically be stayed the minute you allow them to appeal to the Emergency Court of Appeals, and if the Emergency Court of Appeals determines it is invalid, they can vacate the judgment. It is a special body that has passed upon the validity of regulations for years that should determine the question of validity, I mean if they have questioned validity, and plaintiff is perfectly willing for them to determine it, but I don't believe this court has the jurisdiction and I don't believe it should determine it because an expert body that has passed upon regulations year after year ever since the Emergency Price Control Act of 1942 should determine the question. That is the position of the plaintiff.

The Court: All right. Let's proceed with the testimony.

Mr. Campbell: There was a motion to strike.

(Testimony of Benjamin Dix.)

The Court: The motion to strike is denied, Mr. Dooley.

Cross Examination

Q. (By Mr. Dooley): Mr. Dix, you stated in your testimony this morning [127] that the defendants comprise about 95 per cent of the industry, is that correct? A. That is true.

Q. What area were you referring to?

A. What other area is there in Southern California?

The Court: Were you referring to Southern California?

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): How many defendants are there here, do you know?

Mr. Campbell: There are 14, the record shows. 15, counting one that is absent. 14.

Q. (By Mr. Dooley): I show you Defendants' Exhibit A in evidence and refer you to the list of companies at the end there and ask you from your knowledge are those companies in the box and crate business?

Mr. Campbell: If you say they are, I will stipulate they are.

Mr. Dooley: Well, I am not sure. I am asking him.

The Witness: I will say they are, except some of them are out of business.

The Court: Well, they were at that time, were they?

The Witness: They were at that time out of business.

(Testimony of Benjamin Dix.)

Q. (By Mr. Dooley): Did you check the number of defendants there? A. No. [128]

Mr. Campbell: There are 26 firms listed there.

The Court: Will you stipulate there are 26 firms? That is argument. The evidence is before the court.

Q. (By Mr. Dooley): Will you still say that the defendants comprise 95 per cent?

A. Yes.

Q. Now, the number here——

The Court: Just a minute.

Mr. Campbell: There is confusion there.

The Court: His testimony was 95 per cent of the volume, not 95 per cent of the merchants, but 95 per cent of the volume of the business done.

Q. (By Mr. Dooley): Were you speaking of the volume in Los Angeles County?

A. Well, we cover all Southern California.

Q. Do you know whether there are any dealers in Imperial County? A. None.

Q. Inyo County?

A. Where is Inyo?

Q. It is in Southern California.

Mr. Campbell: Bishop and Independence.

The Witness: What big city would it be near?

Mr. Dooley: I am not familiar with that. These counties are enumerated. [129]

The Witness: There are two second-hand dealers in Imperial County.

The Court: Do you mean to tell me you think there is a second-hand dealer in Inyo and Mono

(Testimony of Benjamin Dix.)

County? There aren't any boxes there. You could put them all in one crate.

Mr. Dooley: These are in the order. If his statement that they comprise 95 per cent of the volume——

The Court: If there is a dealer in Inyo or Mono County, they wouldn't do one tenth of one per cent of the business done in this area.

Q. (By Mr. Dooley): What about San Diego County?

A. Since your regulation has come out—before the regulation, there was one dealer. Since the regulation, he has gone out of business. There are two more dealers.

The Court: That makes three all together?

The Witness: At this time there were three, yes, your Honor.

Q. (By Mr. Dooley): You stated this morning Mr. Alvarado purchased all of his containers from the Safeway Stores, is that correct?

A. To my knowledge, yes.

Q. How extensive is your knowledge?

A. If I don't know what my competition is doing, I don't know how I am going to be doing.

Q. So you check up on your competition?

A. Yes, pretty well. [130]

Q. Just how do you check upon your competition?

A. I know exactly what sources of supply are available and I know who is getting business from the sources of supply.

(Testimony of Benjamin Dix.)

Q. You make a special check on each of the dealers in the business? A. Definitely.

Q. I believe you stated this morning you were one of the biggest dealers in the area, is that correct? A. I think so.

Q. You stated you were pretty familiar with the industry. A. Yes.

Q. And you check up on the various companies. Now, what is the volume of your business per year?

The Court: In dollars and cents?

Q. (By Mr. Dooley): Approximately.

A. Over half a million.

Q. Half a million dollars gross, and yet you stated this morning you were not familiar with your customers?

A. I didn't say I didn't know who they were.

Mr. Campbell: That is a misstatement of the record. He stated he knew who he sold to, but he didn't know what they did with the boxes.

Q. (By Mr. Dooley): You were not able to give the percentage sold to traders and packers?

A. No.

Q. And yet you give the number of your accounts as 300 accounts? A. Yes.

The Court: Approximately 300.

Q. (By Mr. Dooley): You referred to a meeting during May 1952, did you not? A. Yes.

Q. And you stated that Mr. Wilson and Mr. Murray were at that meeting? A. Yes.

Q. Did you hear Mr. Murray tell you in effect

(Testimony of Benjamin Dix.)

CPR 142 was the law and until it was changed you would have to comply with it?

A. I didn't understand it to be that way.

The Court: No, that is not the question. Did you hear him say that? You can answer that yes or no.

The Witness: No.

Q. (By Mr. Dooley): You did not hear that? At that meeting did anyone directly tell you to continue to price under order L-117?

A. Directly is a funny word.

The Court: Mr. Dooley, he already testified nobody told him to continue under that directive L-117 and nobody told him not to. You are trying to get him to change his testimony. He [132] said nobody told him to continue and nobody told him not to continue.

Q. (By Mr. Dooley): Did you ever receive any information that CPR 142 had been changed or amended? A. No.

The Court: I think it can be stipulated, can't it, that CPR 142 continued until the end?

Mr. Campbell: It died with the agency.

Mr. Dooley: Yes. I wanted to get his knowledge as to whether he had heard anything of that nature.

The Court: May I ask a question here, counsel? Did CPR 142 establish a price less than the original ceiling price in any commodity?

Mr. Campbell: Yes, your Honor.

Mr. Dooley: I am unable to state, because I don't have any facts.

Mr. Campbell: I can state that it does, based

(Testimony of Benjamin Dix.)

upon Exhibit D, also based upon Exhibits B and C. I was going to use that in my argument. There are specific instances.

The Court: Assuming just for the purpose of an argument that regulation 142 used a ceiling price which was lower than—I am talking about a selling price, not a buying price, a selling price of the defendants—assuming that it sets a ceiling price lower than the original freeze price, did they have a right to do that, did the government have a right to come into [133] an industry and say, “It is true your prices at the time the freeze went into effect were 100 per cent, but we think you are making too much money, so we will set your price at 75,” can the government do that?

Mr. Dooley: I am not sure as to the validity of that, as the plaintiff is of the position the validity is not in question before this court, and to delve into that question, I wouldn’t be able to answer.

The Court: You are prosecuting under a certain regulation. Don’t you think the defendants have a right to test out this regulation?

Mr. Dooley: Yes, your Honor.

The Court: Any place other than the Emergency Court of Appeals?

Mr. Campbell: Now, your Honor, it is in Philadelphia. They used to travel around, but it is all now in Philadelphia.

Mr. Dooley: In the first place, they had an opportunity to protest the regulation if they felt it

(Testimony of Benjamin Dix.)

was unfair. That was within six months after the passage of the regulation.

The Court: Suppose the basic law said that the price on a commodity should be 100, and then by regulation the OPS came along a year later and set the freeze price or ceiling price at 75. Could they lower the OPS price, the ceiling price below what the parties were getting at the time the freeze went into effect? [134]

Mr. Dooley: That is a question that, as I said, I can't say definitely just as to their powers, but I can say, your Honor, they had an opportunity to protest to the Administrator and if the protest was denied, that is even before suit they had that opportunity, they could appeal to the Emergency Court of Appeals then. Now they have an additional chance. I mean I won't say because it would involve a lot of questions of law as to the powers and extent of the Price Administrator in promulgating regulations.

The Court: All right. Proceed. I raise these questions as I think about and as we come to them.

The Witness: Is the government going to supply us with attorneys to do all this?

The Court: You can't argue. You can just answer questions, but don't argue.

Q. (By Mr. Dooley): Did you know, Mr. Dix, where regulation CPR 142 came from?

A. Would you repeat that.

Q. Did you know, Mr. Dix, who promulgated ceiling price regulation 142?

(Testimony of Benjamin Dix.)

A. No, I don't know.

Mr. Campbell: I submit that is a matter of record.

The Court: The witness says, "I don't know."

The Witness: You mean the individual's name?

The Court: The answer is you don't know. [135]

Mr. Dooley: I have no further questions, your Honor.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Campbell: I understood you had a witness you wanted to take out of order.

Mr. Dooley: Yes.

Mr. Campbell: I have no objection.

The Court: All right. It's awfully late in the afternoon now, though.

Mr. Dooley: I have someone here I should like to put on.

The Court: All right.

CHRISTIAN V. MURRAY

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Christian V. Murray.

Direct Examination

Q. (By Mr. Dooley): What is your business or profession, Mr. Murray?

A. I am an attorney-at-law. [136]

(Testimony of Christian V. Murray.)

Q. On or about May 1952, what was your occupation?

A. I was an attorney-advisor in the local Office of Price Stabilization in Los Angeles, California.

Q. How long had you served in that capacity?

A. I started in June of 1951. I had been about a year at that time.

Q. During May 1952 were you present at a meeting between officials or employees of the Office of Price Stabilization and representatives of the Los Angeles Box and Crate Dealers Association?

A. I was. I believe there were two or three meetings in May.

Q. Take the first of these meetings. As you recall it, who else was present at that meeting?

A. At the first meeting, which was around the 5th of May——

Mr. Campbell: I did not get that.

The Witness: It was around the 5th of May, might have been a day before or a day after. I recall there was Mr. Wilson, Mr. Hameetman from the Office of Price Stabilization, there was Mr. Dix and four others from the box and crate industry. Three of those four I recall in the courtroom. I don't know whether the fourth is here. I have forgotten him. But there were five all together.

Q. (By Mr. Dooley): Will you point out the members that [137] you see in the courtroom today who were present?

A. Yes, I think it is Mr. Ginsberg and the gentleman over here.

(Testimony of Christian V. Murray.)

Mr. Campbell: From the Star Box.

The Witness: And the other gentleman beside Mr. Dix.

Mr. Campbell: Mr. Sobelman.

The Witness: There was one other. I don't see him in the courtroom now. He may be in the courtroom and I just don't recognize him.

Mr. Campbell: Mr. Ohanesian, is that the gentlemen you refer to?

The Witness: I couldn't say definitely, but it may be so.

Q. (By Mr. Dooley): In what capacity did you attend this meeting, Mr. Murray?

A. Well, I was an attorney-advisor to the industrial section and I received a telephone call asking if I could attend a meeting in the office of the chief of that section. When I arrived there, I found the five gentlemen with Mr. Wilson and Mr. Hameetman. The meeting had evidently been in session prior to my arrival and they asked me several questions after I got there.

Q. What questions were those, Mr. Murray?

A. The first question was as to the effect of the ceiling price regulation 142. [138]

Mr. Campbell: May we have the parties that asked the questions?

Mr. Dooley: Does the court have a ruling on that?

The Court: Yes. Can you give the names?

The Witness: Yes. Mr. Wilson asked me, "Will

(Testimony of Christian V. Murray.)

you explain the effect of this regulation No. 142 to these gentlemen?"

I explained that it was a regulation issued by the Director of Price Stabilization, that it affected the Southern California area and by its terms was made effective on May 5, 1952. There was quite a discussion following about prices and possible loss.

I was again asked if there was any way, Mr. Wilson, I believe, asked the question again, that this regulation could be stayed in its effect until the local office had a chance to determine facts.

I again explained that the office in Los Angeles, the district office, had no authority, had no power to change or stay the effect of any regulation, that that power was solely in the Washington office, in the Director's office.

Q. What else, if anything, did you say to them?

A. Well, the next item was what could the members of the industry do.

I then explained from the price procedural regulation the system of a protest, application for adjustment or amendment. [139]

I was asked how long it took to get a protest through.

I had to answer from my personal experience it was not very satisfactory, and usually it was several months.

They did ask would it be necessary to retain an attorney to file a protest.

I answered that it was not necessary, but it was

(Testimony of Christian V. Murray.)

a technical application and sometimes attorneys were advisable.

I was asked if there was anything that the local office could do inasmuch as the regulation had been initiated in the Los Angeles office.

I answered that if a protest were filed, based upon my prior experience, it would be sent to the local office for recommendations and determination of certain facts, and since the regulation had initiated in the Los Angeles office, I felt that the same effect or result could be attained by the local office submitting to the Washington office a re-survey of its facts.

That is in effect what was agreed upon at that first meeting, that facts would be determined and that the local office would submit to the national office for further consideration and recommend a change.

Q. You listened to the testimony of Mr. Dix, did you not? [140] A. Yes, I did.

Q. He made the statement that you said that the regulation originated with the Los Angeles office and could be changed in the Los Angeles office. Did you make any such statement?

A. No. Probably it was a misunderstanding. I do recall explaining that the local office had entirely delegated authority, that none of the offices outside of the office in Washington had any power or authority to suspend the operation or to change or amend one of the regulations, that all we could do was recommend to the national office.

(Testimony of Christian V. Murray.)

Q. Mr. Dix also stated that at this meeting Mr. Wilson said to the effect that there were not handcuffs to put all of them in jail, that they need not worry. Did you hear Mr. Wilson make that statement?

A. I heard a statement to that effect. I wouldn't say it was exactly in those words. But, frankly, it was a pleasant meeting. I mean personally we were quite friendly and there was an exchange of banter, shall we say.

Q. Was that statement made by Mr. Wilson?

A. In effect it was, yes.

The Court: May I ask a question?

The Witness: Yes, your Honor.

The Court: Did you, subsequent to this meeting, present the matter to Washington and recommend a change? [141]

The Witness: The office did, your Honor.

The Court: The office did?

The Witness: The office did, yes.

The Court: All right.

Q. (By Mr. Dooley): That was the first meeting. Was there another meeting?

A. There was another meeting about, oh, I would say a week, perhaps, later. That is the meeting at which Miss Frances Lavine was present and it was at that meeting that it was determined to send out the accountants to examine the books to determine what the impact was. They had then operated about a week with the new regulation in effect, and it was to determine what the changes

(Testimony of Christian V. Murray.)

were between the prior operation and the new regulation.

On May 16, I wrote a memorandum to the chief of our accounting section asking that he detail one of his accountants to make a survey in the box and crate industry.

Q. At this second meeting, were the same persons present, to your knowledge?

A. At least three were the same. I am not sure if all five were there. I know Mr. Dix was present at all the meetings I attended, and I believe Mr. Ginsberg was, and I think Mr.—the gentleman behind you. I recall those three definitely at all meetings, but I am not sure whether the other two were the same or not. [142]

Q. Did you have occasion to make a statement at this meeting to anyone?

A. At the second meeting?

Q. Yes.

A. Well, at all meetings I was called upon to explain the regulations, if that is what you mean.

Q. Did you have anything to say concerning the legal effect of the ceiling price regulation 142?

A. I can't be sure at which of the three meetings statements were made. I know at the first meeting the question uppermost was whether the regulation was in effect and had to be observed, and that was definitely answered that we had no power to——

Mr. Campbell: As to this last, I will object. Let's have the witness give the conversation.

(Testimony of Christian V. Murray.)

The Court: He is giving the conversation.

Mr. Campbell: He is giving an interpretation.

The Witness: This was again in answer to Mr. Wilson's query, what could be done with these men.

Mr. Campbell: My objection was, "They were definitely told so-and-so."

The Court: It is what you said to this delegation, that is what we want to know.

The Witness: In answer to a question which, as I recall, came from Mr. Wilson, I advised them that that regulation [143] was a law and that in the local office, the Los Angeles district Office of Price Stabilization, there was no one who had authority to suspend or hold in abeyance its operation, that it was in effect as of the date specified, May 5.

Mr. Dooley: No further questions. You may cross examine.

Mr. Campbell: Shall I proceed?

The Court: Yes, let's proceed.

Cross Examination

Q. (By Mr. Campbell): Mr. Murray, you say you attended at all three meetings of this nature?

A. Three in May. I was in another meeting in about February of last year.

Q. Four all together?

A. Yes. That was much later. That was in the enforcement office then.

Q. Each time you were present, I take it, you were present at the request of Mr. Wilson, who was head of the division?

(Testimony of Christian V. Murray.)

A. I was invited to the meeting, yes.

Q. By Mr. Wilson? A. Yes.

Q. I take it you don't know if other meetings were held [144] at which you were not present?

A. I don't, no.

Q. As a matter of fact, Mr. Murray, with relation to this regulation 142, that was submitted to you locally for your examination prior to the date it was ever signed in Washington by the Director of Price Stabilization, was it not? A. Yes.

Q. At that time your opinion was asked as to the form in which the regulation was set up.

A. The legal sufficiency of the form, yes.

Q. Did you at that time go into the economic figures which make up the sense of this order?

A. No.

Q. You had nothing to do with that?

A. No.

Q. At the time you examined this order in connection with your official capacity as advisor to the section, did you examine any figures to determine whether or not this order actually accomplished the purpose which is set forth as the attempted purpose, Mr. Murray, in its preamble?

A. I considered only the form. I did not consider the factual data in the order.

Q. You didn't consider the substance of the regulation at all?

A. My function was purely on the form and the legal sufficiency. [145]

(Testimony of Christian V. Murray.)

Q. In other words, whether the t's were crossed and the i's dotted?

A. Well, roughly so.

Q. Isn't it a fact that at that first meeting which you attended, which you say was in session when you came into it, that it was agreed by all of the parties present that economically the used box industry composed of dealers could not operate except at a loss under this 142?

A. That was a statement I heard.

Q. You not only heard those statements, did you not, from the box men or their representatives, but also such facts were agreed to by the officials of the OPS who were present?

A. I don't recall any agreement. The agreement, if any, was that it appeared to be from what they told us, and that is why it was determined to have the accountants go out and resurvey the facts.

Q. It was then the determination of these meeting that the situation was at least serious enough to require an appraisal of the economic status of the industry, isn't that correct?

A. That was our opinion, yes.

Q. Did anyone who was present at these meetings which you attended of the OPS take the position that the box companies could operate under 142, could operate economically? [146]

A. No, I don't recall anyone taking that particular position.

Q. At the time that you approved this regulation prior to its being signed in Washington, did

(Testimony of Christian V. Murray.)

you have before you or were you shown any figures by which the ceiling prices as set forth in 142 were arrived at?

A. I saw some sheets but, frankly, I do not recall what was in them.

Q. Did you even examine them? Were you called upon to examine them in connection with the work you did on 142?

A. No. I politely listened while they told me, but I didn't have to make any decision as to the factual matters.

Q. Who was supplying the information on the factual matters?

A. Mr. Hameetman, who was the commodity analyst or business specialist handling the lumber products division. I think he said he surveyed the market and gathered the facts.

Q. Do you know whether or not he had in the course of that survey made any examination, either orally or of the records of any of the dealers who purported to be affected by this order?

A. Of my own knowledge, I do not know.

Q. Isn't it a fact that during the course of these meetings the representatives of the box companies made the point that they had never been consulted with reference to the prices [147] set forth in 142?

A. I do recall one statement, I believe Mr. Dix made it, and I think it was in the first meeting, at which Mr. Hameetman was present, where Hameetman had said he checked the industry.

(Testimony of Christian V. Murray.)

I can recall Mr. Dix saying, "Well, I would certainly like to know whose plant he went to."

Q. What did Mr. Hameetman reply?

A. He replied, gave a couple of names, but who they are now, I have no idea.

Q. Isn't it a fact that in the course of this meeting and in your presence it was stated by one or more of the officials of the Office of Price Stabilization present that while all orders or changes to orders were issued over the signature of Washington, that the local office of the Office of Price Stabilization was the originating body for any regulations and that any changes made in an existing regulation would be only after consultation with the local office?

A. I think I explained that myself to them, that any regulation originating in Los Angeles would be referred back to Los Angeles for re-appraisal.

Q. So that although required by the statute, the Director of Price Stabilization, who at that time was Ellis Arnall, was required to place his signature on any regulation for it to become effective, and he was also required by the statute under his delegated authority from the President to approve [148] of any amendment, nevertheless it was a fact, was it not, that the actual formulation of any regulation affecting the box industry in Southern California would originate and be approved by the local Office of Price Stabilization?

(Testimony of Christian V. Murray.)

A. It would either originate or at least be coordinated with, that is true.

Q. And isn't it a fact that these people were given to understand in words or in substance at that time that although Washington nominally was the signatory party, that the responsible office in formulating the regulations with respect to their business was the Los Angeles Office of Price Stabilization? A. That is correct.

Q. And isn't it a fact when these people inquired during times you were present as to whether specifically they should again engage the firm of Snyder & Snyder, who had represented them in obtaining order L-117, they were advised by one or more of the officials present that that would not be necessary since the recommendations would be made by the local office, who would familiarize themselves with the economic situation of the industry?

A. I do not recall anyone advising them not to retain Snyder & Snyder. I do recall being asked——

Q. I meant no implication that you were not advising them to hire any specific attorneys. I used that name because [149] it might refresh your recollection. Go ahead.

A. I believe I testified before I do recall some of them asking if it were necessary to retain counsel in order to file a protest, and I believe my answer to that it was not a requisite or necessity, but it was a technical type of procedure and they should have legal counsel, if they could. As I recall, there

(Testimony of Christian V. Murray.)

was some question about cost and we were asked if we would help if they wanted to do it without counsel.

Again we said we would render every assistance we could.

Q. Wasn't the upshot of those negotiations it was considered by all parties that protest had been filed with you by reason of these meetings?

A. A technical protest described in price procedural regulations was discussed and it seemed to be the consensus of opinion that it would be an unnecessary waste of time because it used to take months.

Q. And for that reason it was the understanding of the parties, was it not, that by the meetings there in bringing these matters to your attention that they were protesting his regulation as being one which they could not economically continue to do business under?

A. There was a definite protest at those meetings, that's right.

Q. That was so considered by all parties, was it not, I mean as far as the Office of Price Stabilization?

A. We considered it as an objection to the regulation.

Q. Did not the Office of Price Regulation thereafter, immediately thereafter, and at least in part through a written request commence a survey for the purpose of relieving these people from ceiling price regulation 142?

A. That is correct.

Q. Isn't it a fact that one or more responsible

(Testimony of Christian V. Murray.)

officials of the Office of Price Stabilization reported to Washington in writing, making recommendations that ceiling price regulation 142 be abandoned and considered of no force and effect?

A. I can't recall an absolute abandonment of it, counsel.

Q. What do you recall in that regard?

A. I did not write any of the communications myself.

Q. Didn't one of the other attorneys there write such a communication?

A. I don't believe so. In the division of responsibility in a matter which came in, both the commodity section and the legal section participated. If it was a matter pertaining to a section, which this was, the commodity section, the procedure on carrying out the policy, as we termed it, is that the memorandums were initiated in Mr. Wilson's office, in our system they had to go through San Francisco and be acted [151] on in San Francisco, before they got back to Washington.

Q. Through the usual cumbersome channels?

A. Very cumbersome. I do recall having brought before me just for my information, you might say, or interest, memorandums which were just about on their way to being mailed.

Q. When was that in point of time?

A. Some of them were several months afterwards.

Q. Those were the first memorandums you recall as a result of these meetings going forward to Washington?

(Testimony of Christian V. Murray.)

A. No. They were memorandums earlier in that period. As a matter of fact, the regional office sent down a representative to survey the matter, not only in Los Angeles, but in San Diego, and I believe it was a lady. I don't recall her name, but she visited some of the box plants. I know one of our men took her out.

Q. Was her name Isabel Grant?

A. No. Isabel Grant, I believe, had left the organization by that time, but I wasn't in on that week-end——

The Court: Do you know of your own knowledge any letters were written to Washington or to the regional office suggesting the abandonment or modification of regulation 142?

The Witness: I would say letters, your Honor, which were to be mailed. I can't say definitely they were mailed.

The Court: May I suggest to counsel, can you get the letters? [152]

Mr. Campbell: I made a request for the letters.

Mr. Dooley: I have written asking for the letters. I haven't received a reply. I also wrote to Washington asking for statistical data, but they said it was—well, that was immaterial.

Mr. Campbell: I have previously made a request, and I was going to renew the request at this time, requesting a specific letter written by the legal section to Washington. I take it from your statement to the court you are unable to produce such a letter.

(Testimony of Christian V. Murray.)

The Court: Have you got any secondary evidence?

Mr. Campbell: If he doesn't have the letter, I intend to produce something.

Mr. Dooley: If the letter pertains to validity, I was not able to obtain it.

Mr. Campbell: No, this letter was pertaining to the enforcement of regulation 142, a specific recommendation made.

Q. Do you recall a letter on that subject?

A. I beg your pardon, counsel?

Q. Do you recall a letter on that subject pertaining specifically to the enforcement of 142 and the recommendations of the local office with respect thereto?

A. I don't have a concise recollection of it, counsel. I do know there were several memos went forward, and that the local office definitely wanted some change made. [153]

The Court: You say the local office wanted some change made?

The Witness: That's right.

Q. (By Mr. Campbell): Do you recall specifically that these letters which you saw and which were, you say, in the course of mailing, and you presume later were mailed, made a recommendation that these people be relieved from this situation?

A. They more or less recited the facts and asked for consideration to be given to any suggested change.

(Testimony of Christian V. Murray.)

Q. And didn't they recommend that the changes be made, or were they simply fact recitals?

A. No, they went beyond a recital of facts.

Q. They did make recommendations?

A. Yes.

Q. I take it you do not recall at this time the precise recommendations?

A. I had so many things.

Q. You had other industries as well?

A. Yes.

Q. It seems to me you stated you personally on May 16, 1952, in connection with the meetings and the requests for help or assistance from the box dealers, that you personally wrote a letter requesting that a survey be made. Up until the time you left that office in January 1953, had you ever [154] received a survey?

A. Oh, yes. Mr. Kimball, an accountant, was detailed to make the survey, and he came back in later and showed me his spread sheets and explained the effect of them.

Q. Of Order 142?

A. Well, he was explaining what he found in the books and the projection, I believe, of 142.

The Court: The books of whom?

The Witness: He went to some of the defendant organizations.

The Court: All right.

Q. (By Mr. Campbell): I am going to show you Defendants' Exhibit D and ask you if you ever saw that document which is dated February

(Testimony of Christian V. Murray.)

26, 1953, particularly Schedule A attached thereto, being headed Analysis of Costs and Sales of Agricultural Wood Containers to Dealers.

A. No, I don't recall seeing this, counsel.

Q. Did you see a similar schedule to this?

A. The schedule which I recall seeing had the names of firms and the year so-and-so.

Q. When did you receive that?

A. I didn't receive it. Mr. Kimball brought it in to show me what he found. That should be in the OPS file.

Q. How long after your request that such a survey be made was it that you saw that? [155]

A. Honestly, I don't know, counsel, but I assume it was probably within a month or six weeks.

Q. Do you know what happened to that afterwards when Mr. Kimball took it away?

A. No, I really don't know.

Mr. Campbell: I will ask at this time that the government, if possible, produce that particular survey.

The Court: Will you produce any records you can, and if you can't, I will have to admit secondary evidence.

Mr. Dooley: I have no records pertaining to that situation. The government takes the position all of this evidence is immaterial.

The Court: I know what your position is, Mr. Dooley, but, nevertheless, the defendants have a right to present their theory and philosophy to the court. They have a right to have these records if

(Testimony of Christian V. Murray.)

they are obtainable. If you can't get them, I will allow secondary evidence.

Mr. Dooley: I am willing to have secondary evidence admitted if the court considers it relevant.

The Court: I suppose I can have a stipulation at this time that this schedule which is attached to Exhibit D and attached to a letter dated February 26, 1953, was prepared on or about February 26, 1953. This is a schedule that was produced and developed at about the time this letter was written, is that correct? [156]

Mr. Dooley: Yes.

Mr. Campbell: Yes. I am through with the witness, your Honor.

The Court: Have you any other questions?

Mr. Dooley: No further questions.

The Court: May this witness be excused?

Mr. Dooley: As far as I am concerned, your Honor.

Mr. Campbell: Yes, he may be excused.

The Court: You may be excused.

(Witness excused.)

The Court: Well, I notice we didn't get through today. We will now recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Friday, February 12, 1954.) [157]

The Court: Before we proceed, I would like to ask counsel a question. What was the saving clause in these cases when OPS went out the window?

Mr. Dooley: I think that was in 50 USCA Appendix 2156, your Honor. Your Honor, it is almost at the end of the 2156.

The Court: I might ask defense counsel, have you done any research upon this question of the right to prosecute this action?

Mr. Campbell: No, sir, I have not, your Honor, other than the examination of 2156.

The Court: I might ask the United States Attorney, have you got any cases, have any courts ruled that the right to prosecute an action like this survives after the termination of the authority? Have you done any research except to read the Act?

Mr. Dooley: Not except to read the section, your Honor.

The Court: All right. You may proceed. Call your next witness.

Mr. Campbell: Mr. Ginsberg. [159]

ISADORE GINSBERG

one of the defendants herein, called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Isadore Ginsberg.

Direct Examination

Q. (By Mr. Campbell): Mr. Ginsberg, what is your business or occupation?

A. Box and crate dealer.

Q. What is the name of your concern?

A. Growers Box and Crate Company.

(Testimony of Isadore Ginsberg.)

Q. You are one of the defendants in one of these actions? A. Yes, I am.

Q. Growers Box and Crate Company, is that a partnership? A. No, that is individual.

Q. That is the name under which you operate?

A. Fictitious firm name.

Q. Is your concern one of the larger concerns engaged in the purchase and repair and resale of agricultural containers?

A. I would say so.

Q. There was testimony here yesterday to the effect that [160] the 14 concerns that are represented in these actions represent 90 to 95 per cent of the used box industry, is that right, in accordance with your estimate as well?

A. I would say so.

Q. Approximately, to your knowledge, how many were there engaged during the year 1953 in this particular business in the Southern California area? A. Oh, possibly 25.

Q. Possibly 25. As I understand you, the 14 represented here represent 90 to 95 per cent.

A. I am talking about the whole Southern California area, but we are 95 per cent of the Los Angeles area.

Q. Now, Mr. Ginsberg this is, is it not, a highly competitive line of business?

A. Yes, it is.

Q. How long have you been engaged in the business? A. Since December 1937.

Q. As a matter of fact, the greater number of

(Testimony of Isadore Ginsberg.)

concerns are located in a fairly confined area of the city, are they not? A. Yes, they are.

Q. It is also a fact, is it not, that each of you are pretty generally familiar with the sources of supply of used boxes and the places of sale of the rehabilitated boxes by your competitors? [161]

Mr. Dooley: Your Honor, I will object to the leading questions. If the defendant will phrase his questions less leading, I will have no objection.

Mr. Campbell: I will withdraw the question.

Q. Mr. Ginsberg, do you endeavor at all times to keep yourself posted on what your competitors are doing?

A. If I did not, I wouldn't be in business. I have to know what each and every one of my competitors is doing, where they are buying, who they are selling, try to find out their sources.

Q. How often do you keep that check on your competitors? A. Daily.

Q. Do you attempt to familiarize yourself with the prices which they are paying for boxes?

A. Certainly.

Q. And are such prices as are being paid for boxes generally known throughout the produce industry? A. Yes, they are.

Q. Do you attempt to familiarize yourself daily with the prices at which they are selling boxes?

A. Yes, I do.

Q. Let me ask you this, Mr. Ginsberg, based upon your experience in this industry since 1937, will you state what your experience has been as to

(Testimony of Isadore Ginsberg.)

sales prices by yourself and your competitors, that is to say, are the prices offered by [162] the individual concerns exactly the same or within a very close range of being the same daily?

A. Buying prices?

Q. Selling prices. A. Yes, they are.

Q. Incidentally, some emphasis has been placed during these proceedings on the sale of boxes to packers. Does the sale to packers represent a large portion or not of your business?

A. Well, I wouldn't say it is a large portion.

Q. What are your principal sources to which you sell boxes?

A. Well, we sell them to growers and truckers and shippers and packers and anybody who comes in and wants to buy them.

Q. Of course, here in Southern California, we always think of the orange industry as being one of our largest agricultural industries. As a matter of fact, does the purchase and resale of orange crates play any particular part in your business?

A. Well, we have got a peculiar situation on orange boxes for this reason, that in the Los Angeles area, particularly in California, actually most of the fruit that is shipped into the Los Angeles market is considered cull fruit. It isn't the fancy fruit. The fancy fruit is wrapped and packed [163] and shipped in new boxes to the East, and all we get here in Los Angeles is what is shipped in boxes loose, and the wholesale citrus dealer or orange

(Testimony of Isadore Ginsberg.)

dealer charges the retail store a 15-cent deposit on those boxes. They are charging that now and it may vary from time to time.

Q. Where they are buying packed oranges?

A. No, they are loose. There is very little packed fruit sold in the Los Angeles area. There is very little sold, so consequently the stores pay a deposit upon the boxes and the reason we don't handle many of them, and we are not generally concerned with them, is because when we go to the store to buy those boxes, he says, "I want my 15 cents back," and we say, "We can't pay you 15 cents because we have got to resell them for that price." So consequently a lot of people we are buying boxes from don't sell us the orange boxes.

Q. It is a fact, is it not, that practically all the orange packing plants where they pack wrapped fruit construct new boxes on their own premises?

A. That is true.

Q. And those boxes are shipped out of state and do not, therefore, come back into the used channels in California?

A. That's right.

Mr. Dooley: I object again to counsel framing a question and asking him for yes or no. I consider that leading. [164]

The Court: I think it is leading, but I don't know of any harm that is done. Try not to lead the witness.

Mr. Campbell: Yes.

Q. Now, Mr. Ginsberg, I will ask you, in the first place, when the OPS came into effect, your

(Testimony of Isadore Ginsberg.)

business, of course, came under the general order, is that correct? A. Yes, it did.

Q. Will you state with relation to that period, that is to say, the period December 20, 1950, to June 19, 1951, will you state how market conditions in that period varied, if any, from market conditions in your industry during the balance of the year?

A. Well, we in the produce container business have a peculiar situation where in the winter months boxes and crates naturally are not selling as well as they would in the summer months, because there aren't as many crops to harvest. Consequently, we become blocked up with merchandise, it is sitting outside, it gets weather-beaten, and we run out of space and we need money to carry on our operations, so we sell a lot of boxes and crates for a lot less than what they are actually worth, because we are under that pressure for space and we have to unload a certain amount of merchandise to get money. So consequently when the GCPR came through, we were caught with a low ceiling price because that was not the true picture of our prices, and we were handicapped. [165]

Q. Incidentally, in the used container business here in Southern California, are there certain types of boxes which constitute the bulk of your business, your sales? A. Yes, there are.

Q. What are those?

A. Well, I would say lugs, lettuce crates, apple boxes, those three items.

(Testimony of Isadore Ginsberg.)

Q. Incidentally, in connection with lugs there is a distinction, is there not, in the industry as to lugs and so-called field boxes which were used for packing purposes?

A. We don't have a category called a field box, but they do use some of the lugs for field boxes.

Q. But I am referring to field boxes as boxes which are put in the hands of the packers in the field.

A. Yes. They do use lugs for field boxes, but we call them a lug.

Q. But those particular boxes are used again and again by the same group of packers, are they not?

A. That's right.

Q. Their daily compensation is based on the number of boxes they pack, and the loose fruit is then taken to the packing yard and re-packed in shipping containers?

A. That's right.

Q. Now, immediately after the general ceiling price came into effect and you were frozen with the prices which [166] were in effect in January 1950 and February 1951, will you state whether or not you and the other principal box people formed an association?

A. Yes.

Q. Or had that been in existence?

A. We had the association.

Q. You had had the association prior to that time?

A. Yes.

Q. I will ask you whether or not at that time you and the association made any appeal to Wash-

(Testimony of Isadore Ginsberg.)

ington for relief on your principal items from the general price freeze? A. Yes.

Mr. Dooley: Your Honor, I will object to anything taking place for the purpose of the record, I will object to anything that took place prior to the period of the present violation.

The Court: Overruled.

The Witness: We retained Snyder & Snyder, attorneys, to represent us in Washington.

Q. (By Mr. Campbell): That is a local firm of attorneys? A. Yes, in Beverly Hills.

Q. At that time did you provide them with information and data respecting the economic structure of your industry, that is to say, the prices which you paid for your material during the various seasons of the year and the sales price which you had been in the custom of obtaining? [167]

A. Yes, we did.

Q. I will ask you if subsequent thereto you received this order L-117, which is the defendants' Exhibit A? A. Yes, we did.

Q. Did you thereafter follow out the provisions of order L-117, together with the ceiling prices which had theretofore been frozen on items not covered by order L-117? A. Yes.

Q. Did you thereafter and until the end of the price stabilization program to the best of your ability conform your sales prices to those set forth under order L-117, and in respect to items which are not included therein but which were included

(Testimony of Isadore Ginsberg.)

under the general freeze, did you conform your prices to those ceiling prices?

A. Yes, we did.

Q. Now, as a matter of fact, in your industry and during the operation of order L-117, and even after April 29, 1952, when ceiling price regulation 142 was issued, did you always sell at the full ceiling price?

A. Will you state that question again?

Q. After OPS came into being, did you always sell at the ceiling price or did you occasionally sell below the ceiling price?

A. After OPS came in, did I always sell for ceiling price? [168]

Q. For the full ceiling price?

A. Well, no, because there are times when the market might not warrant ceiling price and we would sell for less.

Q. In other words, you did not then set a flat price, full ceiling price for your products, did you?

A. No, because supply and demand, sometimes the supply was too great and our price would automatically drop down.

Q. Now, Mr. Ginsberg, I believe you have been identified as being a member of the committee from the box association which met with the various OPS officials after you people had learned of CPR 142, which is Government's Exhibit 1 here?

A. I was.

Q. Prior to the time that this regulation was issued, had you ever been consulted by anyone from

(Testimony of Isadore Ginsberg.)

the OPS by way of their economic advisors or economists or accountants, or any other official of the OPS with relation to the ceiling prices set forth in 142, either of dealers, yourself, or retailers from whom you were purchasing containers?

A. Never was consulted.

Mr. Dooley: The plaintiff objects for the purpose of the record to this or any other information pertaining to this subject of validity of the regulation on the ground that it is irrelevant, immaterial and has no bearing on any issue before the court.

The Court: Overruled. [169]

Q. (By Mr. Campbell): In connection with your status, not only as a box dealer yourself, but as an official and a member of this committee of the association, did you attempt to ascertain—just answer this yes or no—did you attempt to ascertain whether the OPS officials prior to promulgation of this 142 had consulted with any other of the dealers in the box industry? A. Yes.

Q. You did attempt to so ascertain?

A. Yes.

Q. Did you ascertain whether or not they had consulted with those in the box industry?

A. When you ask me the question, did I ascertain, you are asking me whether I discovered or whether they had contacted any of the dealers?

Q. Correct.

A. I say they had not contacted them prior to the regulation.

(Testimony of Isadore Ginsberg.)

Q. Prior to the regulation?

A. Prior to regulation 142. I checked with all the dealers and I found out that none of them had been contacted, including myself.

Q. In that connection, did you find anyone whom they had contacted?

A. I didn't find anybody that they had. I hadn't spoken [170] to anybody that they had.

Q. Prior to the promulgation of ceiling price regulation 142, how much did your concern customarily receive for the sanding of lugs?

A. Prior to 142?

Q. Yes.

A. A minimum of 5 to 6 cents per box.

Q. How long had that been the minimum?

A. That had been the minimum to my knowledge since 1946.

Q. Since 1946. After 142 came into being and you were a member of this committee, did you attend various meetings with the OPS officials and other members of the committee relative to 142?

A. Yes, I did.

Q. When did you first hear of 142, what was your first knowledge of it?

A. I think that Mr. Dix from the Dix Box told me about it.

Q. Mr. Dix, who was on the stand yesterday?

A. Yes, one of the members of our committee.

Q. That is the first information that you had that there was such an order?

A. That's right.

(Testimony of Isadore Ginsberg.)

Q. How soon after that, to the best of your recollection, [171] did you meet with officials of the OPS?

A. It was, oh, a few days after at the most.

Q. Did you meet with them, did you attend, upon hearing about this new arrangement, a meeting with the OPS officials as soon as they could meet with you?

A. That was the general idea.

Q. That is what you did?

A. Yes, we met with them.

Q. And you attempted to have that meeting as quickly as possible? A. That's right.

Q. Prior to your first meeting with them, had you actually seen one of these orders 142, either in the printed form or any other form?

A. No, I haven't.

Mr. Dooley: I object to the leading question. I believe counsel can phrase the question so that the witness can relate the story of the meeting.

The Court: The question is, had he ever seen it. He can say yes or no. I don't know how it is leading. I will overrule the objection. Has he ever seen the regulation? How is he going to ask him if he doesn't say that?

Mr. Dooley: He can state, your Honor, when did regulation 142 come to your attention, or bring it up some other way. [172]

The Court: Objection overruled.

Q. (By Mr. Campbell): When is the first time

(Testimony of Isadore Ginsberg.)

you actually saw a copy of this regulation 142 either in the printed form or in any other form?

A. At the first meeting we had with our committee at the OPS office on Sixth Street.

Q. Have you any way of fixing that date?

A. Well, it would be some time in May.

Q. Of 1952? A. Yes.

Q. Who was present on that occasion, to the best of your recollection?

A. Benjamin Dix, from Dix Box, and Harry Sobelman from the Acme Crate Company, and, naturally, myself, and I think that Sam Ohanesian from the Standard Crate Company was there.

Q. Mr. Magnuson of Star Box?

A. Yes, and Mr. Magnuson of Star Box and Crate.

Q. Those were from the box industry?

A. From the box industry.

Q. Who do you recall as being there representing OPS?

A. A Mr. Wilson, who was, I think, at that time the head of the OPS office or that particular branch, and Mr. Hameetman, and then——

Q. Do you know his position?

A. Pardon? [173]

Q. Do you know Mr. Hameetman's position?

A. Well, I found out after I come up there that he was supposed to be the OPS investigator to go out and check on prices, buying and selling prices for our industry, but I had never seen him until that date.

(Testimony of Isadore Ginsberg.)

Q. Was it represented to you he had anything to do with this 142?

A. Yes. They told me he was the man who had gone out and got the information for that.

Mr. Dooley: Object and move to strike that as hearsay.

The Court: It may go out.

Mr. Campbell: Prior to ruling on that, your Honor, may I ask a further question?

The Court: He said, "They told me." That is hearsay. Yes, you can ask another question.

Q. (By Mr. Campbell): Who told you that?

A. Mr. Wilson introduced us.

Q. To Mr. Hameetman?

A. To Mr. Hameetman.

Q. That was said in Mr. Hameetman's presence?

A. Yes.

Q. Did he deny that he held that office or had that function? A. No.

The Court: I will change my ruling. I will deny the [174] motion.

Q. (By Mr. Campbell): Who else was present at that time, if you recall?

A. Mr. Murray.

Q. Mr. Murray is the attorney who appeared here yesterday? A. Yes.

Q. Was he there at the start of the meeting?

A. I think he came in just about the start of the meeting.

Q. Will you proceed and relate what occurred there on that occasion, Mr. Ginsberg, giving us the

(Testimony of Isadore Ginsberg.)

words and who spoke them, if you can recall them; if not, give us the substance of what was said on that occasion.

A. Well, we came up there naturally——

Q. Let me ask you this preliminarily. It was a friendly meeting? A. Yes, very friendly.

Q. All the men there with you were on a friendly basis?

A. Frankly, they tried to make us feel very much at ease and we never felt we had anything to worry about. They acted very sympathetic, and we——

Q. Let's get what they said.

A. We came up and presented our case and showed them where we could not stay in business operating under the price [175] schedule they had set up whereby they would allow our source of supply a higher price and had decreased our selling price, and we brought out the fact that the labor cost had gone up in the meantime.

Q. What did you tell them in regard to your labor cost?

A. We had two labor increases. The previous May 15 we had signed a contract for a raise and we were already in negotiations with Local 630 of the Teamsters Union for another contract.

The Court: May I ask a question? Wasn't the ceiling on wages in effect at this time?

The Witness: There was no ceiling on wages. We argued that with the Teamsters Union and they told us there was no ceiling on wages as far as

(Testimony of Isadore Ginsberg.)

they were concerned, that if we didn't give the raise they were going to close us up, they wouldn't let a truck come into any of the dealers, and the Teamsters Union is pretty tough, as you know.

Q. (By Mr. Campbell): Anyway, you had granted a raise and you called that to the attention of the OPS officials at that time? A. Yes.

Q. Proceed with what you told them.

A. After we got through explaining our story, they were very sympathetic and——

Q. What did they say that led you to believe they were [176] sympathetic?

A. They told us that inasmuch as the investigation was made here in Los Angeles, and even if they had to go back to Washington to adjust the prices, that inasmuch as it would take so long to do it, that they thought they could possibly take care of it right here in our Los Angeles office and they would recommend it by sending back letters to Washington and try to hurry it up as soon as possible.

Q. What else, if anything, do you now recall was said on that occasion?

A. Well, for example, Mr. Wilson was very jovial about it. He said, "After all, we haven't got enough handcuffs to put you all in jail and I wouldn't worry about it, if I were you. We will do the best we can."

Q. Was anything said in that conversation relative to your engaging lawyers again to take up the matter in Washington?

(Testimony of Isadore Ginsberg.)

A. Well, they seemed to feel——

Q. What was said, not what they felt.

A. Well, Mr. Murray said that he didn't think it would be necessary actually for us to—he said, "It is good to have counsel, but inasmuch as the mistake was made here in the Los Angeles area, and even though they had"—the price changes generally come from Washington, D. C., that he would see to it that they would get the information back there and hurry [177] back relief on the price schedule.

The Court: Just a minute. May I ask a question? Did he use the word "mistake"? You said a mistake was made.

The Witness: He might not have used the word mistake. He might have used another word, which I cannot recall, but it was inferred there was a mistake.

The Court: The regulation had its inception here in Los Angeles. Did he tell you that the regulation had been a mistake?

The Witness: They did agree that on this information that we brought up, they agreed it was a hardship and he agreed he would send this information back revising the price schedule so that we could have relief. To my way of thinking, that inferred that there was a mistake made.

Q. (By Mr. Campbell): Let me ask you this, was there any agreement expressed at that time with respect to the representations made by the box people that you could not operate under this sched-

(Testimony of Isadore Ginsberg.)

ule as set forth in 142? Did they say anything to indicate that they recognized you could not operate under this schedule?

A. Yes, they agreed that we couldn't operate under 142.

Q. Economically, you couldn't continue to operate?

A. That's right, they did agree on that.

Q. Was anything said about how long it would take you if you went through the regular channels of sending attorneys [178] to Washington?

A. Well, they said it would take several months.

Q. As I understand, it was indicated to you in words that the local office, having originated this order, could correct the order?

Mr. Dooley: I object again to the leading tone of the question.

The Court: I think the objection is good. Sustained.

Q. (By Mr. Campbell): There was a whole series of meetings, was there not? A. Yes.

Q. Over how long a time did they extend, Mr. Ginsberg?

A. Oh, a couple, three months, I imagine.

Q. I will ask you if as a result of these meetings it is your definite understanding that the local office would secure the setting aside of this 142 and restoration of the situation as it then existed——

Mr. Dooley: Object to the leading question.

(Testimony of Isadore Ginsberg.)

Q. (By Mr. Campbell): —prior to that time? I am going into the state of mind.

The Court: What difference does it make? Is the question of wilfulness an issue in this case?

Mr. Campbell: It is a question.

The Court: The question of wilfulness may be an issue in this case relative to treble damages?

Mr. Campbell: Yes.

The Court: I might say to you I don't anticipate, if I find for the plaintiff, giving treble damages, so you don't have to go into the state of mind of this witness. I will sustain the objection.

Mr. Campbell: I will withdraw the question.

Q. After your initial meeting with the officers of the Office of Price Stabilization and after you had been advised of this CPR 142, did you continue to operate your business under the prices set forth in Order L-117 with respect to items set forth in it and did you continue to operate your business as to other items with respect to the frozen prices which had come into being with the operation of the Act originally? A. Yes, we did.

Q. To your knowledge, was that generally done throughout the industry? A. Yes.

Q. Will you state specifically whether or not the officials of the Office of Price Stabilization were advised at all times as to what was being done?

A. Yes, they were.

Q. Were you instructed by anyone to desist from that practice? A. No, I was not.

Q. Did you hear any of the others so instructed?

(Testimony of Isadore Ginsberg.)

A. No, they weren't.

Q. Did you at all times, both before and after April 29, 1952, maintain full and complete records at your place of business as to the containers bought by you from others for resale and the containers sold by you, both as to the type of container and the prices sold for and the services as were rendered on those containers? A. Yes, I did.

Q. Were those records open and available at all times to any proper official of the Office of Price Stabilization? A. They were.

Q. Were your records at all times not only made available to them, but subsequent to April 29, 1952, and subsequent to your first meeting, was any examination made of your records?

A. Subsequent to our first meeting?

Q. Yes. A. No.

Q. At those meetings, will you state whether or not you offered those records to the Office of Price Stabilization? A. Yes, I did.

Q. Were any other records offered?

A. Yes. All the dealers brought up our records. I had my accountant draw up profit and loss statements and cost sheets and income tax reports and everything to show the differential [181 between our margin of profit under CPR 142 and what it was previous to that.

Q. And what you had been making as net profit prior? A. That's right.

Q. What did you do with those records after

(Testimony of Isadore Ginsberg.)

you took them up to the OPS? Did you leave them there?

A. They didn't keep them. We took them back again.

Q. Did they examine them at the time you took them up there?

A. They sort of glanced at them.

Q. Did they make transcripts of any kind or copies? A. Yes, they did.

Q. After you had made those records available to them, did you have any further conversation with them as to whether or not you could operate under 142?

A. Did I ask them whether I could operate under 142?

Q. No. Did you have any further conversations with them concerning the subject of whether you could operate at a profit rather than a loss under 142?

A. We told them we couldn't operate at a profit, we would have to take a loss.

Q. Did any official of OPS ever indicate to you his opinion was to the contrary, you could operate without a loss under 142?

A. No. They all agreed we were right. [182]

Mr. Campbell: You may cross examine.

Mr. Dooley: Before cross examination, your Honor, I make a motion to strike all of the testimony of the witness prior to the period of the violation, May 5, 1952, through January 31, 1953, on

(Testimony of Isadore Ginsberg.)

the ground that it is irrelevant and immaterial to any issue before this court.

I also move to strike all the testimony of the witness pertaining to the raise in wages, also pertaining to inability to make profit, or whether the members of OPS consulted with them prior to CPR 142, on the ground it is immaterial here to any issue before the court and irrelevant.

The Court Denied. Mr. Dooley, you have agreed that order No. L-117 was a valid order and it appears that defendants operated under order L-117 for about a year and a half.

Mr. Dooley: Yes, your Honor.

The Court: Then ceiling price regulation 142 was issued. Is there anything in 142 to revoke in any way No. L-117?

Mr. Dooley: Yes, your Honor.

The Court: Can you point it out to me?

Mr. Dooley: Yes, your Honor, I will. Section 1(c) of ceiling price regulation 142 states as follows:

“This regulation supersedes the general ceiling price regulation with respect to the transactions covered.”

The Court: I know, but it was the general ceiling price [183] regulation that was the freeze order, the original freeze order, was it not?

Mr. Dooley: Yes, your Honor. I would like to further quote in that connection from Order L-117.

The Court: From what?

Mr. Dooley: 117, the first paragraph of order 117.

(Testimony of Isadore Ginsberg.)

The Court: All right.

Mr. Dooley: "Reference is made to your application, filed through Snyder & Snyder, attorneys-at-law, of Beverly Hills, California, dated June 7, 1951, in which you request that the Director of Price Stabilization establish ceiling prices for your fruit and vegetable containers under the provisions of Section 7 of the General Ceiling Price Regulation. This regulation authorizes the Director of Price Stabilization to set ceiling prices for a commodity or service when such price cannot be determined under any other section."

So it is clear from the order itself it was established under subsection 7 of the general ceiling price regulation.

The Court: That may be perfectly true, but when you supersede the general ceiling price regulation, do you supersede anything that was done under that regulation?

Mr. Dooley: It would seem so. Something was issued under the general ceiling price regulation and the general ceiling price regulation itself has been superseded. I don't see [184] how any orders made under the general ceiling price regulation could continue in effect.

The Court: You may proceed with your cross examination.

Mr. Dooley: Your Honor, did you make a ruling on the motion?

The Court: I deny your motion.

(Testimony of Isadore Ginsberg.)

Cross Examination

Q. (By Mr. Dooley): Mr. Ginsberg, you stated that no OPS officials checked with any members of the industry. How did you ascertain that?

Mr. Campbell: He said that he could find——

The Witness: I spoke to them. We have an association and we are friendly. We talk to each other. We do business with each other. I call them up and they call me up. That was the only way I could find out, was by speaking to them.

Q. (By Mr. Dooley): Did you ask each one?

A. Yes, I did.

Q. Why were you interested in that at that time?

A. It was relevant to our business. I had to know.

Q. So you asked each member of the industry in Los Angeles County?

A. As far as I know, I did.

The Court: Have you any evidence, Mr. Dooley, to the contrary? [185] If you have some evidence to the contrary, produce your evidence.

Mr. Dooley: I was seeking to show the improbability of the witness' testimony, without having any direct evidence to the contrary.

The Court: Do you know of any instance just prior to regulation 142 that they went around and checked the industry?

Mr. Dooley: No, your Honor. I don't know of any instance.

Q. Coming back to the meeting or meetings that

(Testimony of Isadore Ginsberg.)

you said were held between certain members of the committee of the box and crate industry and officials of the Office of Price Stabilization, did you hear Mr. Murray tell you that ceiling price regulation 142 was in effect and was the law?

A. Did I hear him saying it was in effect and was the law?

Q. Yes.

A. I don't recall him saying that.

Q. Mr. Murray was present at that meeting?

A. Yes, he was.

Q. After this meeting was held, did anyone tell you that ceiling price regulation 142 had been changed?

A. After this meeting did anyone tell me that ceiling price 142 was changed?

Q. Yes. [186]

A. You mean OPS official?

Q. OPS official or anyone.

A. No, I don't recall hearing anything like that.

Q. After this meeting did you go back down to the OPS offices? A. After which meeting?

Q. You said there were several meetings. After the last of the meetings.

Mr. Campbell: He couldn't have gone back after the last of the meetings.

The Court: I don't understand you.

Q. (By Mr. Dooley): Did you go down to the OPS office after the last of the meetings between the committee and the OPS officials?

A. No, I didn't.

(Testimony of Isadore Ginsberg.)

Q. You stated that the meetings were over a period of two or three months, is that correct?

A. I think so.

Q. After the three months you didn't check on the matter any further? A. No, I didn't.

Q. You stated that the officials of OPS were advised at all times that you were complying with order L-117 after the passage of CPR 142. How were they advised?

A. Our records were open and at the time we had our meetings [187] with them, we told them that they would always be available to them.

Q. But you didn't actually advise any of them, did you?

A. Yes, we did, at the time we were there.

Q. What did you advise them?

A. Well, after we had our meetings, you mean?

Q. First, during which meeting and what did you advise them?

A. Well, we just went along on the basis of what they told us that we could do. They said that the order had originated in the Los Angeles office and that they were going to correct it and we could go along on the same basis and they would try to give us our relief as soon as possible.

Q. You stated that the OPS officials were advised at all times that you were continuing to price under order L-117.

A. I did not call them up every day and tell them. They knew when we left there that we were going along on the basis of L-117 and they were

(Testimony of Isadore Ginsberg.)

going to give us relief as soon as they possibly could.

Q. How did they know? Did you tell them?

A. Yes.

Q. Directly, or in what way did you tell them?

A. By speaking to them.

Q. Did you say, "Mr. Wilson, I am going to sell my commodities under order L-117"? [188]

A. We told them we couldn't operate under ceiling price regulation 142. We told them we couldn't operate under ceiling price regulation 142 because we would have to lose money and we didn't have the same mark-up we had previously.

They agreed that it was true and that they were going to try to get us relief and that we would have to go along on the basis of L-117.

Q. So you told them that you couldn't operate, rather than you wouldn't operate, isn't that correct?

A. We told them it would be impossible to operate under 142.

The Court: They never at any time gave you a letter or written memorandum that it would be possible for you to operate under L-117?

The Witness: We had a letter on 117.

The Court: But after the meeting you had down at the office of OPS relative to regulation 142, did anybody ever write you a letter, give you a memorandum of any kind that you could still continue to operate under 117?

(Testimony of Isadore Ginsberg.)

The Witness: No, but they gave it to us verbally.

The Court: But not in writing?

The Witness: Not in writing.

Mr. Campbell: Your Honor, we don't contend in behalf of any of these defendants that there was a written memorandum.

The Court: I assumed there wasn't any writing, but I [189] wanted to be sure.

Mr. Campbell: I am applying it to all the other cases as well.

Q. (By Mr. Dooley): You stated in your direct examination that Mr. Murray told you any change would have to go to Washington.

A. I will explain myself again. Mr. Murray, when he listened to all the facts and figures that we gave him, he agreed that the thing was not equitable, that our price schedule gave us a smaller mark-up than what we had had previously, and we had already assumed two raises in wages. He came out with this statement, he says, "It is true that these things are changed back in Washington, D. C., but inasmuch as these prices were investigated here in Los Angeles and originated here," he said, "I am going to see to it that we get information back to Washington, D. C., to recommend," and he stated this very emphatically, "recommend that we have these prices changed so that you can get relief in the very near future."

Q. Did you ever get any information that anything came from Washington, D. C.?

(Testimony of Isadore Ginsberg.)

A. No, we didn't.

Mr. Dooley: No further questions.

The Court: After he told you that he was going to recommend that the prices be changed, what was said then about continuing to operate under order L-117? [190]

The Witness: Well, he didn't actually say anything either way. He didn't commit himself either way.

The Court: He didn't tell you to continue under L-117?

The Witness: But he also didn't say that we couldn't continue under L-117.

The Court: Just kept still?

The Witness: Just kept still, he didn't say a word.

The Court: When in doubt that is a pretty good thing to do, to keep still.

Mr. Dooley: No further questions.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Campbell: May we have the morning recess at this time?

The Court: Yes. It is 11:00 o'clock. We will now recess until 10 minutes after 11:00.

(Recess.)

Mr. Campbell: If the court please, I have a witness on his way here and I would like to interrupt the next witness when he arrives to put him on.

The Court: All right.

Mr. Campbell: Mr. Ohanesian. [191]

SAMUEL OHANESIAN

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Samuel Ohanesian.

The Clerk: Will you spell your last name?

The Witness: O-h-a-n-e-s-i-a-n.

Direct Examination

Q. (By Mr. Campbell): What is your business or occupation? A. Box dealer.

Q. What is the name of your concern?

A. Standard Crate Company.

Q. Is that a partnership or fictitious name?

A. Partnership.

Q. Who are your partners?

A. My brother.

Q. How long have you been in the box business?

A. We are the first box business, my father started it.

Q. You are the original box business?

A. Yes.

The Court: How many years ago was that?

The Witness: Approximately 30 or 32 years ago. [192]

The Court: Can you keep your voice up a little bit?

The Witness: Yes, sir.

Q. (By Mr. Campbell): Your concern is one

(Testimony of Samuel Ohanesian.)

of the largest concerns in the used fruit and vegetable container business, is it not?

A. Yes, sir.

Q. You have heard the statements made by the previous two witnesses that in their opinion the 14 dealers here represent approximately 90 to 95 per cent of the business. Is that in conformance with your estimate? A. Yes, sir.

Q. Mr. Ohanesian, without going into the history of the industry, were you a member of the committee of box companies which called upon the officials of the Office of Price Stabilization with respect to purported ceiling price regulation 142?

A. Yes, sir.

Q. When was the first time that you ever saw a printed or otherwise copy of CPR 142?

A. When Mr. Ginsberg called me and told me about it after the first meeting. I was not present at the time.

Q. You were not present at the first meeting at the OPS? A. That's right.

Q. Prior to the first meeting, which was early in May by the testimony, you had never heard of this 142? [193] A. That's right.

Q. When was the first time you ever saw a copy of this 142?

A. I got one through the mails.

Q. Shortly after that, would you say?

A. Well, a number of weeks after that.

Q. What are your duties in connection with the Standard Crate Company?

(Testimony of Samuel Ohanesian.)

A. Well, I am the general manager.

Q. Do you supervise both the buying of boxes and the selling of boxes? A. Most of it.

Q. Prior to the first time you ever saw this 142, were you ever consulted by any official of OPS relative to the prices set out? A. No, sir.

Q. Did you ever have any discussions, orally or otherwise, with any official of OPS relative to the proposed ceiling prices of dealers and retailers?

A. No, sir.

Q. Would your testimony be the same as that of Mr. Ginsberg with relation to the close knowledge which those who are in the used vegetable and fruit container business have of others engaged in the same business in this area?

A. Yes, sir. [194]

Q. Have you had discussions with others in the same line of business, that is to say, dealers relative to whether or not officials of the Office of Price Stabilization consulted with them relative to these proposed ceiling prices? A. Yes, sir.

Q. In any instance, did you receive information that they had consulted with them?

A. Yes, sir.

Mr. Dooley: I object to that as calling for hearsay, your Honor.

The Court: I think it is hearsay. The objection is sustained. May I ask a question while we are interrupted?

You say you got a copy of the price regulation through the mail. It is dated April 29, 1952. How

(Testimony of Samuel Ohanesian.)

long after April 29, 1952, did you get that through the mail, approximately?

The Witness: Well, it was several weeks after.

The Court: Several weeks after?

The Witness: In fact, that 142 was mailed out to the commission houses before we got it.

The Court: Did you have any notice of any kind at all relative to regulation 142 until you received it?

The Witness: We got notice when Mr. Ginsberg and the committee went up the first time, but they did not get No. 142. [195]

The Court: You didn't go with them?

The Witness: No.

The Court: Did you have any notice from anybody that 142 was in effect?

The Witness: No, I did not.

The Court: Regulation went into effect on April 29, 1952. This action was filed May 1, 1953. During that period did anybody tell you you were going to be prosecuted because you were charging above the prices set forth in regulation 142?

The Witness: No, sir, not until the time they came over and checked the books.

The Court: When did they come over and check the books?

The Witness: I forget the exact date. I think the first time they called me was in July or August.

The Court: July or August when? 1952?

The Witness: 1952, yes.

The Court: When they checked the books, did

(Testimony of Samuel Ohanesian.)

they tell you a complaint was going to be filed because you had been selling over ceiling prices?

The Witness: Yes.

The Court: They told you that, did they?

The Witness: I presume they did.

The Court: Don't you know?

The Witness: No. Yes, I think they did tell us that.

The Court: Then even though they told you that, you continued [196] to operate?

The Witness: We continued to go to the OPS.

The Court: You still operated under L-117, didn't you?

The Witness: That's right.

Mr. Campbell: I would like to fix the date of that, if I can.

Mr. Dooley: I object, your Honor. The witness has testified as to the date.

The Court: Overruled.

Q. (By Mr. Campbell): Mr. Ohanesian, tell me this. At the time you were told that there was going to be some prosecution against you, was that before or after the full Office of Price Stabilization went out?

A. Before.

Q. How long before?

A. Oh, maybe a month.

Q. Maybe a month?

A. Maybe a month or so.

Q. How long was it prior to the time you were served with this complaint?

A. Approximately a month, a month and a half.

(Testimony of Samuel Ohanesian.)

Q. Before you were served with this complaint?

A. That's right.

The Court: May I ask a question?

Mr. Campbell: Certainly. [197]

The Court: When was the Office of Price Stabilization discontinued here in Los Angeles, what was the cut-off date?

Mr. Campbell: January 1953.

Mr. Dooley. April 3, 1953. I am not positive of the date. I believe it was in April, though, your Honor.

Mr. Campbell: You mean the cut-off of the office or the termination of the program?

The Court: I mean the cut-off of the office, when the office was closed here.

Mr. Campbell: I think that was April 1953. The price ceilings here concerned went out on January 31, 1953. Is that correct?

Mr. Dooley: It was on January 18, 1953, that the ceilings went off, but the office stayed on until April 1953.

Mr. Campbell: I am trying to place the date of this conversation.

The Court: I want to know something now, if I can find out. The complaint was filed May 1, 1953. That was after the office was closed. Who was the instigator of this complaint? The U. S. Attorney didn't go out and look for business. Somebody had to come in. Who was the party who was the real instigator? This matter wasn't presented to the grand jury in any way, was it?

(Testimony of Samuel Ohanesian.)

Mr. Dooley: No, your Honor. This is a civil matter. The OPS enforcement section, Mr. Harrington, I believe, was in [198] charge of the enforcement section, had investigated these various firms, had checked the books and records and made certain computations which showed they were in excess of CPR 142 and they were referred to this office. As far as I can ascertain, that is the history of it.

The Court: They were referred to the office before January 1953?

Mr. Campbell: Maybe we can stipulate. My understanding is the investigation did not take place until January 1953.

The Court: You mean the investigation took place after the ceilings had gone off?

Mr. Campbell: As I understand it. The record, as indicated by the complaint, your Honor, runs up to January 31, 1953.

Mr. Dooley: In one of the cases, I think all of the cases were referred at the same time, it was referred by letter from the Office of Price Stabilization dated March 23, 1953. It seems to have been received in our office April 15, 1953. It may have gone through other channels.

Mr. Campbell: I think we can probably agree that the investigation did not commence until after January 31. The books and records of the dealers up to January 31, 1953, were called for and examined by the OPS, at which time, subsequently,

(Testimony of Samuel Ohanesian.)

the recommendation for instigation of this suit was made. [199]

Mr. Dooley: But from the witness' testimony, there is nothing to indicate he may not have been told prior to that.

The Court: I am not interested in the testimony of this witness. I was interested in the facts as to whether this was referred to the office, and evidently it was referred to your office for prosecution after the ceiling prices had gone off.

Mr. Dooley: Yes, your Honor.

The Court: You just told me the ceilings went off January 31, 1953, and you didn't get the referral until April, so evidently it was after. Evidently, from counsel's statement, the investigation was not made until after the ceiling went off.

Mr. Dooley: I will have to do more checking, your Honor.

Mr. Campbell: Maybe we could pass that. Could I interrupt with the witness I referred to, your Honor.

The Court: Yes. Go ahead. Excuse me for breaking in.

(Witness withdrawn.) [200]

DON F. CLARK

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Don F. Clark.

Direct Examination

Q. (By Mr. Campbell): Mr. Clark, what is your business or occupation?

A. I am an attorney.

Q. Where are you presently officing?

A. 639 South Spring Street. I am in private practice at this time.

Q. During the years 1952 and 1953, what was your occupation?

A. I was an enforcement attorney for the Office of Price Stabilization, specifically in charge of the division known as industrial materials, manufacturing goods and industrial materials.

Q. In what location did you occupy that position, Mr. Clark?

A. In Los Angeles at 108 West Sixth Street, the district office in Los Angeles.

Q. Your immediate superior was James Harrington, the [201] enforcement attorney?

A. Yes, he was the district enforcement director.

Q. In connection with your assignment there, did matters concerning dealers in the used agricultural and fruit box business come to your attention?

A. It did.

(Testimony of Don F. Clark.)

Q. As an enforcement attorney?

A. As an enforcement attorney.

Q. Do you recall approximately when the matter was first brought to your attention, Mr. Clark?

A. Yes. It was brought to my attention by a letter from Washington, not a specific complaint locally, I would say the latter part of December in 1952.

Q. The latter part of December, or could it have been the first part of January 1953?

A. It could have been. It was right around the Christmas period.

Q. The end of 1952 or the beginning of 1953?

A. Right in there, yes.

Q. That was the first time the box industry had been called to your attention officially?

A. Yes, sir.

Q. Incidentally, so that we can establish a date, do you recall the date that the OPS ceilings were lifted?

A. Yes, sir. They were lifted by a series of orders. [202] There was no one order that lifted ceilings on everything.

Q. I know. They came along gradually?

A. Yes. There was one order that lifted large bulk consumer goods, and the other specific items were then lifted, and there was an overall blanket order lifting the remaining. The series of orders came in January 1953.

Q. Do you recall the specific date that would apply with relation to this industry?

(Testimony of Don F. Clark.)

A. I would say the last two weeks of January 1953.

Q. You would not find fault with the date of January 18, 1953, which has been suggested?

A. That would be very close.

Q. When did the Office of Price Stabilization actually close, if you know?

A. April 15, 1953.

Q. Did you remain there during the last days of the agency?

A. Yes. We remained, some enforcement officers remained after that date for a short time to wind up our pending work, but the office closed officially April 15.

Q. At the time that you first had your attention directed to the box industry in December 1952 or January 1953, had any investigation of possible over-ceiling sales in that industry been completed, to your knowledge?

A. Not by the enforcement division. I believe there had [203] been some economic studies made.

Q. Only economic studies made?

A. That's right.

Q. Thereafter, either at your direction or the direction of someone else, was an investigation commenced on that subject?

A. Yes, sir, at my direction an overall investigation was commenced.

Q. So that the investigation as to whether or not these people were in violation of regulation 142 did not commence until after your attention had

(Testimony of Don F. Clark.)

been directed to the industry by this letter of late December 1952 or early January 1953?

A. That is correct.

The Court: When did this overall investigation commence?

The Witness: Your Honor, it commenced, to the best of my recollection, I would say in the early part of January 1953. I can say this, that as to the actual date it commenced, I am not sure, but as to the date that the investigation was enlarged and pushed forward, it was later than that. We had preliminary inquiries, but we did not go in to actually investigate at all until later on in January.

Q. (By Mr. Campbell): While you were still in office there, Mr. Clark, and before the actual closing of the office, you had made available to you certain reports of investigating officers of OPS who conducted an investigation pursuant to your [204] request or your direction, which in turn was, pursuant to its charge, brought to your attention by this letter of early January 1953, is that correct?

A. That is correct.

Q. During that period of time, it is a fact, is it not, that you also held meetings of various representatives of this industry for the purpose of determining the equities of their situation?

A. Yes, we did.

Q. Those began at some time after January 1, 1953, and continued, not only during the time that all of the ceilings were lifted, but even subsequent to that date?

A. That is correct.

(Testimony of Don F. Clark.)

Q. As a result of these reports which you received from your investigative agencies and as a result of the meetings which you had with representatives of the industry, I will ask you if you made a written report, particularly on the matter of the equities existing on the part of the box industry, to Washington. A. Yes, I did.

Q. Do you recall the date of that, roughly?

A. I made several reports. I would say that March of 1953 was the date of my most comprehensive report on the subject.

Q. March 1953? [205]

A. It might have been the latter part of February, but it was February or March.

Q. At that time then, that was prior to any time any action had been instituted against these people?

A. Yes.

Q. Do you yourself have a copy of that communication, Mr. Clark?

A. No. I looked through the records I did retain. I don't have a copy. But I remember specifically the correspondence.

Mr. Campbell: This is the document I referred to yesterday as having made a request of the United States Attorney that he produce, and I believe he stated that although he had made inquiry from Washington, he had not received a copy of the document. Is that correct?

Mr. Dooley: There has been no formal request of the United States Attorney. You mentioned that there was a letter written and asked me if I would

(Testimony of Don F. Clark.)

see if I could get hold of it and I told you I would try. Of course, I will object to this as being immaterial and irrelevant to any issue before this court, but I have no objection if the court deems it material, to you introducing secondary evidence.

The Court: If it is an objection on the ground it is immaterial, the objection is overruled.

Q. (By Mr. Campbell): Will you, to the best of your recollection, [206] Mr. Clark, state your findings as set forth in that letter as to the equities of the situation in the box industry?

A. Yes, sir. With the court's permission, I would have to give a little background, if that is satisfactory.

Mr. Campbell: We have no jury here.

The Court: Go ahead.

The Witness: We had investigated a case just before we were completing these box cases in which on a technicality the subject of the investigation was in our interpretation of the specific regulation guilty of a violation. It was extremely technical. The subject cooperated to the extent of bringing this violation to our attention by means of a letter asking for an interpretation, what he should do.

Q. (By Mr. Campbell): That was with relation to some other industry, some other case?

A. Yes. The price division, the person in the price division who had obtained the letter, turned it over to enforcement and stated from this letter there were probably some violations. It was turned over to our office, the case was opened, and we had

(Testimony of Don F. Clark.)

no other authority but to proceed and make an investigation, which we did, and upon the conclusion of the investigation it was apparent from the facts that there was technically a violation, there were certain factors, such as the subject had brought this to our attention, that there was [207] no intent on his part, that nobody had been hurt, because it was a subsidiary corporation the sale was involved to, and these facts we considered sufficient to close the matter.

Q. And you did close the preliminary matter in your office?

A. No. We had no authority to close it that way. So I drafted a letter with Mr. Harrington's approval and signature asking authority to close the case on the basis from the equities involved and the extreme technicality of the violation we did not feel justice would be obtained by further prosecuting the matter.

We received an answer stating that we were an administrative agency, that Congress passed the laws and set up the yardsticks, that all we did was investigate and apply the facts, and if there was a violation, technical or otherwise, we had no discretion to close the matter and we should forward it to the United States Attorney's office with the facts and the equities could then be considered either by the United States Attorney's office or a court. This letter had come into the office just before this time.

When we completed our investigation in this

(Testimony of Don F. Clark.)

case, we found ourselves in the same position. We held a meeting with the industry.

Q. You say you found yourself in the same position. You were in the same frame of mind, were you, that the [208] equities in this situation were in favor of the defendants?

A. Yes, and if we had authority, we would have closed the case, but we had no authority.

Q. By reason of previous instruction?

A. That's right.

The Court: You say that was a memorandum from Washington?

The Witness: No, this was a letter, a letter from the Director of Enforcement, Lambert O'Malley, to Mr. Harrington.

The Court: Saying that the equities could be considered by the District Attorney's office or by the court?

The Witness: Yes, but not by the administrative agency.

The Court: Are you sure he said the equities could be considered by the United States Attorney or the court?

The Witness: It was pointed out that in negotiations by the United States Attorney's office, the Department of Justice would consider, in arriving at a compromise or any other conclusion, matters such as the probability of successful prosecution, et cetera, which we could not consider administratively.

(Testimony of Don F. Clark.)

The Court: Mr. Dooley, do you have a copy of that letter?

Mr. Dooley: I don't recall a copy of that letter in our file. However, what he states is true with respect to a compromise. The Department of Justice considers the financial status of the parties.

The Court: What I am interested in here is the statement of this witness that the court can consider the equities. Now, [209] thus far my opinion of your position has been that I couldn't consider the equities, if I found there was a violation, I was going to have to render judgment in accordance with the prayer of the complaint.

Mr. Dooley: At least single damages, your Honor, and I have a case from the Ninth Circuit Court of Appeals arising on that question where the court can consider with respect to giving treble damages, the case of Fleming vs. Hanson, 162 F.(2d) 164.

The Court: You don't have to read it. I will read the case.

Mr. Dooley: It is the last paragraph in the opinion, your Honor, that mentions that very thing.

The Court: I thought if you had that letter we could see what was actually said.

Mr. Campbell: We have the unfortunate circumstance of some files being in Washington.

The Court: You may proceed.

The Witness: As a result, the local office was required to refer the case to the United States Attorney's office, and the set procedure provided for a referral memorandum which was a form mem-

(Testimony of Don F. Clark.)

orandum and in which this previous correspondence would not be proper or wouldn't be incorporated.

Q. (By Mr. Campbell): At that time you wrote a letter to Washington, did you not, setting your views forth with relation [210] to the proposed prosecution of these suits? A. Yes, sir.

Q. That is the letter which I was trying to get to. Will you relate what you stated to Washington as to the equities in this situation?

A. In the letter I referred to the report of the investigation. I might point out at this time that at all times the investigation was under my control and I had the investigators look for certain points and for certain persons. I wanted to know more about the background of the economic effect of order 142 compared to the previous letter order, I think 117 was the number, but I am not sure.

Q. 117, yes.

A. The investigators interviewed the audit division and the economic division, who had at the request of the price division supposedly gathered certain figures, and made a comparison to determine whether or not this order 142 was equitable, whether there should be some recommended revision.

Q. I interrupt to call to your attention Defendants' Exhibit D, which purports to contain an economic analysis dated February 26, 1953, and ask you if that was one of the matters which you had before you at that time, if you recall.

A. Yes. This investigation and this memoran-

(Testimony of Don F. Clark.)

dum was made at my request as part of our investigation.

Q. In other words, this Exhibit D was prepared as a [211] result of your request that the investigation be made? A. That's right.

Q. Now you may proceed.

A. There were two investigators assigned to this matter and they were working full time on it. The investigation disclosed——

Q. Pardon me, Mr. Clark. I don't think we can proceed into that. The question was directed at your recommendations with respect to the equities of the situation.

A. As a result of the investigations, it was my opinion and it was so stated in my recommendation that order 142 had increased to the retailer the price of used wooden agricultural crates in such a manner that a super market or the ordinary source of supply to a reconditioner would be able to charge a higher price for the unfinished used boxes; that prices on certain of these containers had been increased for the reconditioner after he had reconditioned and resold them, but other boxes had not been increased.

That as a result, from a strictly theoretical standpoint, without regard to the actual number and type of containers sold in the Los Angeles market, that theoretically a reconditioner could maintain his average mark-up as he had before, but in applying the actual type of boxes and the number to the reconditioners here, there was a very bad economic

(Testimony of Don F. Clark.)

squeeze, and that we came to the conclusion that a reconditioner [212] could not follow the order and stay in business.

Q. In other words, it was your conclusion, after the examination of the matters obtained by the investigation and economic survey, that the effect of 142, if enforced, would be to cause the local dealers to operate at an actual loss rather than at a profit, is that correct? A. That is correct.

Q. That was a statment which you forwarded to Washington upon the completion of your investigation which was originated in January 1953?

A. We did state from a strictly impartial standpoint, and we pointed out the other facts, that there was an avenue of correction for the box people, such as petitions for relief, and that these steps had not been taken, but we did point out that we felt that they believed such action was being taken by the Office of Price Stabilization.

Q. It was your conclusion that these people honestly believed such steps were taken?

A. We felt they honestly believed so, but they did not take the technical legal procedure that was set forth in the Act.

Q. The indicated legal procedure would have been to make a written appeal to Washington?

A. That is correct.

Q. But you also found, on the other hand, that these [213] people had come to the conclusion that the local office was taking the necessary steps.

A. That is correct, as a result of the meetings.

(Testimony of Don F. Clark.)

The Court: In this letter, did you make any recommendation to the Department?

The Witness: We made the statement in the concluding paragraph that in view of the fact that the office was closing and these were the last remaining cases in a pending status, and in view of the letter we had received with regard to the other matters, stating that the administrative office had no jurisdiction to consider equities, the matters were being referred to the United States Attorney's office.

Q. (By Mr. Campbell): You cited this previous instruction that you had locally no prerogative in the matter?

A. Yes. That was all done in one letter, or a series of two or three, I don't recall, but it was all done in a short period of time.

Mr. Campbell: You may cross examine.

Mr. Dooley: I have no cross examination. I would like, however, to make a motion to strike all his testimony as being irrelevant and immaterial to any issues before this court.

The Court: Motion denied.

Mr. Campbell: Your Honor, may Mr. Clark be excused?

The Court: Have you any further use for Mr. Clark?

Mr. Dooley: None. [214]

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

SAMUEL OHANESIAN

having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Mr. Ohanesian, you heard the testimony of Mr. Clark as to when this investigation took place, that is in January 1953, or commencing January 1953. Does that refresh your recollection as to when you were first told you would be charged with being in violation of 142?

A. Yes.

Q. What is your recollection when you were first advised you were going to be sued by the government?

Mr. Dooley: I object on the ground the question has been asked and answered.

The Court: Overruled.

The Witness: Well, after they checked my books, they told me I was in violation.

Q. (By Mr. Campbell): That was January 1953? A. About that time. [215]

Q. Now, Mr. Ohanesian, in the first place, when you first learned of 142, when was that?

Mr. Dooley: I object to that.

The Court: He testified he got it through the mail. Sustained.

Q. (By Mr. Campbell): Did you, Mr. Ohanesian, at all times keep full and complete records in your place of business as to where you purchased boxes and to whom you sold them and the prices at which you sold them?

(Testimony of Samuel Ohanesian.)

A. Yes, sir.

Q. Were they open and available for inspection by any authorized government agency or agent?

A. Yes, sir.

Q. Did you at all times attempt to fully live up to the provisions of order L-117 with respect to items set forth in order L-117?

A. Yes, sir.

Q. Did you keep in close touch with other members of the industry in that regard?

A. Yes, sir.

Q. Aside from the first meeting, you attended the other meetings with officers of the OPS with the committee? A. Yes, sir.

Q. Do you have any recollection different from that testified by the witnesses who preceded you, Mr. Dix and Mr. [216] Ginsberg, concerning what took place at that time? A. Yes, sir.

Q. What do you recall in addition to or different than they recalled?

A. Every time we had a meeting with the OPS officials, they always told us that they were going out of office and that they didn't know what was going to happen, they might not be there Monday, and they agreed it was all right to use L-117.

Q. That was your definite understanding?

A. Yes.

Q. Based on that, you continued to use L-117?

A. In fact, they asked us if we were satisfied with L-117.

Q. Who asked you that, do you remember?

(Testimony of Samuel Ohanesian.)

A. I don't remember the names, but one of the officials. We agreed on it.

Q. You were satisfied with L-117?

A. Yes.

Q. Other than that, is your recollection the same as theirs? A. Yes.

Mr. Campbell: You may cross examine.

Mr. Dooley: I object to that question. I don't want to make the testimony repetitious.

Mr. Campbell: I will change the form. [217]

Q. Would your testimony as to other matters be the same as theirs? A. Yes.

Mr. Dooley: That is a leading question.

The Court: Mr. Dooley, if we have to bring every one of these defendants in and put him on the stand, we will be here for two or three days. I don't think it is necessary. The objection is overruled.

Mr. Campbell: I was going to ask, after this witness is through, if we could stipulate the others would testify to the same effect.

The Court: Let's wait until we are through with this witness.

Mr. Campbell: You may cross examine.

Mr. Dooley: I would like the witnesses to take the stand, but to ask this witness a blanket question, is your testimony the same as the others——

The Court: Substantially the same. Have you got any cross examination?

Mr. Dooley: A little bit, your Honor.

The Court: Mr. Dooley, it's nearly 12:00 o'clock.

(Testimony of Samuel Ohanesian.)

Mr. Dooley: It won't be over two or three questions.

The Court: All right. [218]

Cross Examination

Q. (By Mr. Dooley): Mr. Ohanesian, you were present when Mr. Murray testified, were you not?

A. Yes, sir.

Q. Was Mr. Murray at this meeting?

A. Yes, sir.

Q. Did you hear Mr. Murray state CPR 142 at that meeting was in full force and effect?

A. I did not.

Q. Did anyone ever tell you CPR 142 had been changed? A. No.

Mr. Dooley: Your Honor, I have a few questions in addition, if you want to call the recess, and I can finish afterwards.

The Court: No. Go ahead, if it is only going to take a few minutes.

Mr. Dooley: It won't be long.

Q. You stated somebody at the meeting told you to go ahead. Do you know who it was that told you to go ahead under order L-117, do you know who he was?

A. It was a very friendly meeting. There was four or five members of the OPS there. I don't recall which member of the OPS said that.

Q. Do you know what position he held with the OPS? [219]

A. I think he was a U. S. Attorney.

(Testimony of Samuel Ohanesian.)

Mr. Dooley: No further questions.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

The Court: How many more witnesses do you anticipate calling, or do you want to get a stipulation?

Mr. Campbell: Yes. Can it be stipulated the others if called, the members of the committee, would testify substantially the same as these three witnesses?

Mr. Dooley: The plaintiff will so stipulate.

Mr. Campbell: I would like to go over my notes and then we will rest.

The Court: Do you have any other testimony?

Mr. Dooley: Yes, your Honor, I have an additional witness.

The Court: How long will he take?

Mr. Dooley: Well, he shouldn't take any more than 30 minutes even on cross examination.

The Court: We will recess until 1:30 this afternoon.

Mr. Dooley: All of the defendants who testified were present at the meeting. I would like to call one defendant who was not present.

The Court: You can call anybody you want to, Mr. Dooley, [220] on your redirect, if you want. We will now recess until 1:30 this afternoon.

(Thereupon, an adjournment was taken until 1:30 p.m., of the same date.) [221]

The Court: You may proceed.

Mr. Campbell: The defendants will rest, your Honor.

Mr. Dooley: The plaintiff calls as a witness Mr. Arlington Wilson.

ARLINGTON J. WILSON

called as a witness herein by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Arlington J. Wilson.

Direct Examination

Q. (By Mr. Dooley): Mr. Wilson, on or about May 1952, what was your occupation?

A. I was acting branch chief of the industrial and manufacturing goods section of the Office of Price Stabilization, Los Angeles.

Mr. Campbell: Pardon me, Mr. Wilson. Can you keep your voice up a little bit? It is difficult to hear. Would you repeat your title?

The Witness: Acting branch chief of the industrial and [222] manufacturing goods division of the Office of Price Stabilization, Los Angeles. In that respect I would like to say I got an Irish promotion yesterday from Mr. Dix, when he put me as head of the OPA. That is not correct.

Q. (By Mr. Dooley): How long had you served in that capacity, Mr. Wilson?

A. From February 14, 1951, about, to January 31, 1953.

Q. On or about that date, were you present at

(Testimony of Arlington J. Wilson.)

a meeting or meetings with representatives of the Los Angeles Box and Crate Dealers Association?

A. Yes.

Q. Referring to the first of these meetings, who else, if anyone, was present?

A. Well, there was a meeting far ahead of that one which was held in the Produce Exchange down in the market somewhere, I don't know who was responsible for calling the meeting, whether we did or whether the producers did or whether the box people did. That was late in February 1951 or some time in March. That was really the first meeting.

Q. Do you recall when the ceiling price regulation 142 came out? A. Yes.

Q. The first meeting after that regulation——

The Court: Just a minute. Let me go back and find out something. The regulation which is known as order No. L-117 [223] is dated June 28, 1951. I understood you to say that there had been a meeting before this regulation came out?

The Witness: That's right. Shortly after the general price ceiling regulation went into effect.

The Court: And regulation L-117 came out after that meeting?

The Witness: Yes.

Q. (By Mr. Dooley): Calling your attention to the first meeting after ceiling price regulation 142 was promulgated, who else, if anyone, was present at that meeting?

A. Jack Hameetman for one, and usually at

(Testimony of Arlington J. Wilson.)

those meetings that I officiated at, I always made it a point in a big group meeting to call in an attorney, and it is very possible he was there. He may have come in after the meeting got started, but I am pretty sure he was there, Mr. Murray.

Q. You stated you officiated at the meeting, is that correct? A. That's right.

Q. The representatives of the Los Angeles box and crate companies, do you know what representatives were present?

A. Well, I recognize quite a few of them. I can't call them by name, but I see quite a few of them out here.

Q. Will you point out the men to the court, please?

A. I know Mr. Dix, and this other gentleman——

Q. The witness is identifying Mr. Dix. [224]

Mr. Campbell: Will the men who were present stand up? Do you recognize these gentlemen?

The Witness: Yes.

The Court: For the record, will you give us their names?

Mr. Campbell: For the purpose of the record, those he has identified are Mr. Ginsberg, Mr. Dix, Mr. Ohanesian, Mr. Sobelman, Mr. Magnuson.

Q. (By Mr. Dooley): What was the subject of discussion at this meeting, Mr. Wilson?

A. Well, thinking back, I think, as a matter of fact I know it was the problem of the freeze, the

(Testimony of Arlington J. Wilson.)

original freeze on their prices of boxes during that period December 20 to January 19, 1951.

Q. Was there any discussion concerning ceiling price regulation 142?

A. That would be at the second meeting.

Q. I am referring to the meeting that took place after the ceiling price regulation 142 came into effect.

A. Yes. They came down and more or less protested, they had a problem that they wanted to discuss with us, and we welcomed it.

Q. You were here yesterday and you heard Mr. Dix state that you made a statement somewhat to this effect, that there are not enough handcuffs to put them all in jail. Will you state whether or not you made that statement? [225]

A. It is very likely I did. Perhaps I should qualify that by saying this, that I had established a policy as far as that branch agency was concerned, that we were there to help the businessmen in their different problems and the interpretation of the regulations and to be of whatever help we could be. We always made it known we didn't have anything special to give except consideration to their problem and an interpretation of the regulations, and to be helpful. The chances are I would say that there are not enough handcuffs around, and in addition to that, I perhaps also told them, as I have told others, we just don't have horns down there, that we were a father confessor of the

(Testimony of Arlington J. Wilson.)

people and we wanted to know what their problems were and we wanted to be helpful to them. That was the program all the way through. But, on the other hand, there was a statement made yesterday, something to the effect——

Mr. Campbell: Pardon me. I am going to object to this.

The Court: You can't volunteer any information. You can only answer questions.

The Witness: All right.

Q. (By Mr. Dooley): You were here and heard the testimony of Mr. Dix yesterday, were you not?

A. Yes.

Q. Are there any respects in which that testimony is at variance with your view of the events at that meeting?

Mr. Campbell: Pardon me. I am going to object to the [226] question in that form as not competent.

The Court: Overruled. You can answer yes or no only.

The Witness: Will you repeat the question?

The Court: Read the question.

(Question read.)

Mr. Campbell: It is calling for a conclusion, if the court please, and opinion. It is not a statement of fact.

The Court: He can answer yes or no. If he thinks the testimony is substantially correct, he can say "Yes," and if not, he can say so.

(Testimony of Arlington J. Wilson.)

The Witness: Substantially correct. There is only one point I would like to clear up, if I may.

The Court: What point is that?

The Witness: That point is that Mr. Dix said, "Don't worry." What I want to say, and perhaps I did say it, maybe, I can't tell, but I think there is a big difference between "Don't worry," and "Just go out and do as you please regardless of the regulation."

Mr. Campbell: I ask that last be stricken.

The Court: That may be stricken as a conclusion.

Q. (By Mr. Dooley): Will you state whether or not you told any of the members of the Los Angeles Box and Crate Association to continue pricing under order No. L-117?

A. There is only one answer to that and that is no, definitely. [227]

The Court: None of these defendants have testified they were told to disregard the regulation. They testified that they said they were going to proceed under L-117 and the OPS did not tell them to proceed under L-117, didn't tell them not to proceed under 117. In other words, they kept quiet.

Mr. Dooley: Well, I believe this last witness testified somebody advised them, and it was not very clear——

Mr. Campbell: If the court please, we have the testimony of Mr. Murray, produced by the government, who said the same thing. If this is an attempt to impeach the testimony of Mr. Murray, I am going

(Testimony of Arlington J. Wilson.)

to object to it on the ground it is not proper impeachment.

The Court: Objection overruled. The answer may stand. But, however, that is in the record. If you want to change it, you are changing it at your own peril.

Mr. Dooley: No, your Honor. I was just considering this last witness that took the stand this morning, that I wanted to get clarified, your Honor.

The Court: My recollection of that testimony is that he didn't say anybody told him to disregard the regulation.

Mr. Dooley: I believe he said he was advised—I asked him specifically who advised him and I believe he said he thought it was a United States Attorney.

Mr. Campbell: You are not referring to Mr. Dix' testimony? [228]

Mr. Dooley: No. The last witness this morning.

The Court: That is Ohanesian. I did not get it that way. Maybe he said that. If he did, I didn't get it.

Mr. Campbell: He said one of the OPS people there. He didn't say Mr. Wilson. He was asked who it was and he said he wasn't sure.

The Court: He didn't testify anybody told him to disregard the regulation 142.

Mr. Campbell: No, but they told him he could go ahead under 117.

The Court: But this question was relative to dis-

(Testimony of Arlington J. Wilson.)

regarding price regulation 142, and none of the defendants have testified they were told to disregard that regulation.

Mr. Dooley: I believe the question was to continue under order 117, your Honor. I am not sure.

The Court: Well, go ahead.

Mr. Dooley: The answer has been given.

The Court: The answer may stand.

Q. (By Mr. Dooley): You were here yesterday and heard Mr. Murray's testimony, is that true?

A. Yes.

Q. Will you state whether or not Mr. Murray stated to the members of the industry that CPR 142 was the law, or words to that effect?

A. Yes. [229]

Mr. Campbell: I will object to the question in that form. What Mr. Murray testified to is in the record.

Q. (By Mr. Dooley): Will you state whether the testimony as given by Mr. Murray substantially represents what occurred at that meeting?

A. Yes.

Mr. Campbell: I am going to object to that on the ground it calls for a conclusion of the witness.

The Court: Overruled. You followed the same procedure yourself. It was objected to by the United States Attorney and it was overruled.

Mr. Campbell: No, I asked the question, would your testimony be substantially the same. He is asked to find fault with Mr. Murray's testimony.

(Testimony of Arlington J. Wilson.)

The Court: Objection overruled. The answer is "Yes."

Mr. Campbell: I must learn the virtue of silence, your Honor.

Q. (By Mr. Dooley): Mr. Murray, during that meeting——

The Court: This is not Mr. Murray.

Q. (By Mr. Dooley): Mr. Wilson, during that meeting did you promise any of the representatives of the industry to have CPR 142 amended?

A. I wouldn't say I promised that it would be amended. I promised, perhaps, may have promised that we would make some attempt and present the facts or get the facts through the different [230] channels and have a research made of the whole deal, and then we had no authority, we had no delegation in this district office, nor did the regional office in San Francisco have delegation to amend the regulation. It all had to be prepared and passed through San Francisco to Washington and the final answer would have to come from them. I think that about covers it.

Q. You said there was more than one meeting. At the other meetings, what was the subject of discussion after ceiling price regulation 142 came into effect?

A. Well, as I recall, there was a renewal of the previous discussions and a presentation of, maybe, some questions on the part of the economists and the accounting section, the accountants, and perhaps a report to the group on what action had already

(Testimony of Arlington J. Wilson.)

been taken to date. That would be the procedure.

Mr. Dooley: No further questions. You may cross examine.

Cross Examination

Q. (By Mr. Campbell): Mr. Wilson, I take it from the date that you gave that you were active in the local Office of Price Stabilization from the time of its inception until the office closed?

A. Well, that needs an explanation. I will make it as short as I can. I was perhaps the first one that was brought [231] into the office of industrial materials and manufactured goods. In the early stages I handled all the various commodities myself, busy bird dog, gasoline and woods and everything else. We were short. It was some time later, maybe towards the latter part of the mid summer, I guess about August, that a chief had been appointed, but during his stay there, he was absent a great part of the time, and finally was relieved. During his absence and in the interim periods I served as acting chief. In other words, I was in charge and then out of charge, one day in and the next day or next week out.

Q. At any rate, you remained in the local office until it was closed? A. That's right.

Q. And January 31, 1953, was the closing date of the office? A. That's right.

Q. Isn't it a fact that the ceiling with respect to this particular industry, used wooden agricultural container industry, had actually been lifted

(Testimony of Arlington J. Wilson.)

in a general lifting of approximately January 19, 1953, if you recall that?

A. I don't recall that.

Q. You don't recall anything to the contrary?

A. No. At that time we had at the close of the office some 250 regulations in the one branch alone, so it is pretty difficult. [232]

Q. You couldn't keep your finger on each one of them?

A. That's right, without refreshing my recollection from records.

Q. You referred first to a previous meeting prior to 142 which was held back in February 1951 down in the produce market. Isn't it a fact that the box dealers, these dealers, were not represented at that meeting, but that was a meeting with the wholesalers down there?

A. There was a large group of them. I am not in position to say, but I know that the box people were there.

Q. Do you remember specifically any of these people being there? A. Yes.

Q. Who do you recall?

The Court: That was a meeting prior to L-117?

The Witness: Yes, way back.

The Court: Well, I don't think it is material as far as this is concerned.

Mr. Campbell: Then I will withdraw the question, your Honor.

The Court: There was a meeting and there was discussion.

(Testimony of Arlington J. Wilson.)

Q. (By Mr. Campbell): Now, Mr. Wilson, did you yourself have anything to do with the formulation of this regulation 142?

A. Only by direction. I perhaps put the motion in operation [233] to proceed and make the investigation in the field.

Q. That led up to this 142?

A. Yes, sir.

Q. Did you yourself prior to the promulgation ever see this 142 that you recall at this time?

A. I saw it in its original form as it was submitted to the regional office for transmittal to Washington. Whether the wording is the same or whether the figures and things are the same, I am not in position to know.

Q. Who was the actual draftsman of the figures set forth in here?

A. There was a combination there, the business analyst, Jack Hameetman, and the economist and the accounting section.

Q. Do you recall any of the other individuals besides Hameetman? A. Sir?

Q. Do you recall any of the other individuals besides Hameetman?

A. There was a girl named Lavine. I have forgotten her first name. She was an economist. Then there was either the head of the accounting section or his assistant. I don't remember.

Q. Were you present at any time prior to April 29, 1952, when the prices as set forth in this regu-

(Testimony of Arlington J. Wilson.)

lation 142 were discussed with any of the box dealers? [234]

A. Do you mean at a meeting in my office or something like that?

Q. Yes, in your office or in their office, a group of them, or individually?

A. I think I would like to answer that by saying if they were there, I presided at the meeting.

The Court: Well, they said they weren't there.

Q. (By Mr. Campbell): They said they were never interviewed about 142. Were you present at any time when they were?

A. I will abide by that. That's all right.

Q. You have no contrary recollection?

A. That's right.

Q. Do you recall at these meetings after the promulgation of 142 if any of these box dealers in these meetings asked if they should engage attorneys to take up the matter of amendment or change of this 142, and their being told by you or someone in that meeting that while an attorney was always helpful, it was not necessary inasmuch as the local office would take the necessary steps to obtain relief, or to that effect?

A. That is substantially correct. I at no time would say do not employ counsel or outside help regardless. I mean there is only one answer to that. I would never say, "Don't do that." [235]

Q. But you do recall substantially the conversation which I related, that the local office would take the steps necessary to get them the relief?

(Testimony of Arlington J. Wilson.)

A. That would be the procedure, yes. We would be glad to help them. However I expressed myself, we were always rather friendly to this group and tried to assist them with their weighty problem.

Q. It is a fact that these people came to you and very frankly, and you very frankly with them discussed the problem in the industry, isn't that right?

A. That's right.

Q. You and the other officers expressed your sympathy with the situation in which they found themselves, did you not?

A. Yes, to a large degree, yes.

Q. It was generally recognized at these meeting, was it not, that these people could not economically operate, at least by their representations and subject, you say, to your further investigation, under the prices as set forth in 142?

A. There was evidence of that, and for that reason we agreed to go into the subject and see what we could do to help them out.

Q. Isn't it a fact that the meetings continued from time to time right up until practically the expiration of the OPS?

A. Yes, I think that is correct. [236]

Q. You think that is correct?

A. Yes. What intervals, I wouldn't be able to tell.

Q. Prior to January 1953 when the investigation leading to these particular complaints was originated, according to the testimony of the law enforcement attorney, were you present at any

(Testimony of Arlington J. Wilson.)

time at which you or any other OPS official advised these people that if they continued to operate under 117 and did not operate under 142, that the government would bring any proceedings against them of any kind?

A. No, I don't recall anything like that. That may have been from another division, but I don't recall anything like that.

Q. You never made such a statement?

A. No.

Q. Or no such statement was made in your presence? A. No.

Q. It is a fact, isn't it, Mr. Wilson, that these people told you and you knew at the time of all of these meetings that these people were continuing to operate under 117 and the general price ceiling, rather than 142?

A. I don't know as I fully understand that question.

Mr. Dooley: I would like to ask the court if counsel would make his question simpler.

Mr. Campbell: I will break it up.

Q. These people at all times in the course of these meetings [237] told you that they were continuing to operate under 117?

A. No, I don't think I ever heard them say they were continuing to operate under 117, and if they had, I would tell them very quickly that they would be very likely to be in violation.

Q. Did you ever tell them that?

(Testimony of Arlington J. Wilson.)

A. Not to my recollection. I don't think I ever heard that they were operating under 117.

Q. Didn't they from time to time—do you recall that from time to time they said to you, "Come down and go over our records. We can show you we can't operate under 142"? Do you recall that? A. Yes, I will agree.

Q. You recall that they brought records into your office for examination of those concerned with that type examination, including their income tax returns, do you recall that?

A. No, that I do not remember.

Q. You don't remember that that did not occur, you just have no recollection on the subject?

A. That's right.

Mr. Campbell: I think that's all.

Mr. Dooley: You may step down, unless the court has something.

The Court: No, I have no questions.

(Witness excused.) [238]

The Court: Call your next witness.

Mr. Dooley: I would like to call Mr. Abe, one of the defendants, under Rule 43(b).

WALTER S. ABE

one of the defendants herein, called as a witness by and on behalf of the plaintiff under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Walter S. Abe.

Mr. Campbell: Is this rebuttal testimony?

Mr. Dooley: Yes, concerning the meeting and the subsequent events.

Direct Examination

Q. (By Mr. Dooley): Mr. Abe, you are with the A. B. C. Crate Company, are you not?

A. That's right.

Q. And you are the owner of this company, are you not?

A. That's right.

Q. Where is this company located?

A. 612 South Santa Fe or 610.

Q. In Los Angeles, California?

A. That's right. [239]

Q. You have heard the testimony of various witnesses concerning the meeting with OPS officials. You weren't present at those meetings, were you?

A. No.

Q. Did you ever learn what went on at those meetings?

A. Yes, through my neighbor, Acme Crate. His name is Harry Sobelman. He give me the information what is going on.

Q. He gave you the information?

A. That's right.

(Testimony of Walter S. Abe.)

Q. Did you ever go down to the OPS office personally? A. No.

Q. You relied upon what the individual from the Acme Crate told you?

A. Yes, whatever is going on, I will ask him and he tell me what is going on.

Q. Did you take any steps to find out whether CPR 142 was amended or not?

Mr. Campbell: I object, if the court please. This is not proper rebuttal testimony.

The Court: Overruled. You may answer the question.

The Witness: What was it?

The Court: Read the question.

(Question read.)

The Witness: CPR 142 mean the second ceiling price issued? [240]

The Court: Will you read the answer?

(Answer read.)

Mr. Campbell: Do you understand the question, Mr. Abe, that he asked you?

The Witness: Well, he asked me about CPR 142. What is that CPR 142? Is that the second price issued to us?

Q. (By Mr. Dooley): I will ask this question. What did your neighbor tell you took place at the meeting?

Mr. Campbell: That is objected to as hearsay, if the court please.

The Court: Sustained.

(Testimony of Walter S. Abe.)

Q. (By Mr. Dooley): Do you know a regulation that came out around May 1952?

A. Yes, I know it came down.

Q. Was one mailed to your company?

A. Yes, I have one, first one, and then I have a second one.

Q. Did you ever take any steps to see whether that regulation was changed?

A. Why it changed?

Q. Did you ever take any steps to see whether the regulation that was mailed to you had been changed?

Mr. Campbell: I think it has been stipulated it was not changed.

The Court: There has been no evidence anybody did anything [241] except go down and talk to the OPS. They never filed any petition. They never attempted to appeal to Washington. There is no testimony here anybody did anything.

Mr. Dooley: I want to point out that the defendants will show they did or they could, he seems to be bringing that forward, and the point I am trying to bring out is he probably should have gone to ask.

The Court: Supposing he did? They had a committee that went down to ask.

Mr. Dooley: But had he taken practical precautions by relying on what his neighbor tells him?

The Court: What are you trying to establish? Treble damages?

Mr. Dooley: Not particularly on that point, but

(Testimony of Walter S. Abe.)

I want to bring out all the facts of the case for the benefit of the court.

The Court: The facts are already in. I don't think this witness can change the facts in any way. Every one of these witnesses testified they didn't do anything except go down and talk to OPS.

Mr. Dooley: No further questions.

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.) [242]

Mr. Dooley: Will the defendants' counsel stipulate all the other persons who were absent from the meetings will testify substantially as Mr. Abe?

The Court: That is, they made no attempt to go down and find out whether the regulation had been changed?

Mr. Campbell: Other than what their committee had done or what they were advised by their committee. I think it is agreed these are all members—the stipulation covers the fact that these are all members of an association and they sent a committee down there and they discussed the matter with the committee members afterwards. Their testimony would be all the same in regard to that.

Mr. Dooley: In rebuttal the plaintiff would ask the court to take judicial notice of price procedural regulation No. 1 and revision 2 found in 17 Federal Register 377.

The Court: Is that relevant to the way the regulation can be changed?

Mr. Dooley: Yes, your Honor.

The Court: All right. I will take judicial knowledge of it.

Mr. Dooley: The plaintiff has nothing further, your Honor.

The Court: The plaintiff rests?

Mr. Dooley: The plaintiff rests.

Mr. Campbell: Defendants rest. [243]

(Discussion between court and counsel.)

The Court: Well, I am satisfied all the equities in this case are in favor of the defendants. I am satisfied regulation 142 is an invalid regulation, that the defendants are entitled to rely upon L-117. Judgment will be for the defendants in all these actions. You will prepare findings of fact and conclusions of law?

Mr. Campbell: Yes, your Honor. [244]

[Endorsed]: Filed July 19, 1954.

[Endorsed]: No. 14432. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Dix Box Co., a partnership, Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky, individually and as partners in Dix Box Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 20, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14432

(and consolidated cases Nos. 14432-14440 and
Nos. 14442-14446)

UNITED STATES OF AMERICA, Appellant,

vs.

DIX BOX CO. and BENJAMIN DIX, doing busi-
ness as Dix Box Co., et al., Appellees.

STATEMENT OF POINTS ON APPEAL

The appellant hereby designates the following points on appeal in the above entitled matters:

1. The District Court was without jurisdiction to declare Ceiling Price Regulation No. 142 void and of no force and effect.

2. The District Court erred in declaring Ceiling Price Regulation No. 142 void and of no force and effect for failure of the Office of Price Stabilization to comply with the provisions of 50 U.S.C. App. Sec. 2104.

3. The District Court erred in finding that the conduct of the officials of the Los Angeles Office of the Office of Price Stabilization estopped the President and those to whom he had delegated authority from enforcing Ceiling Price Regulation No. 142.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

[Endorsed]: Filed September 15, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

DESIGNATION OF RECORD TO BE PRINTED

Pursuant to Stipulation and Order for Printing
of Record, Submission of Briefs, and Argument,
heretofore entered into by the respective parties,
relative to the above entitled appeals, appellant
hereby designates the following record to be printed
in the appeal of United States of America, Appel-
lant, vs. Dix Box Co., et al., Appellees, No. 14432
only:

1. Docket entries;
2. Complaint for Damages;
3. Answer;
4. Request for Admission Under Rule 36;
5. Answer to Request for Admission Under Rule
36;
6. Stipulation As to Remaining Issues;
7. Findings of Fact and Conclusions of Law;
8. Judgment;

9. Notice of Appeal;
10. Statement of Points on Appeal;
11. Designation of Record to be Printed;
12. Plaintiff's Exhibit 1;
13. Defendant's Exhibit A.

* * * * *

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 15, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

STIPULATION AND ORDER FOR PRINTING
OF RECORD, SUBMISSION OF BRIEFS,
AND ARGUMENT

Whereas, the judgment of the Court below in all of the above captioned appeals were based upon one consolidated trial, and;

Whereas, the record in each of the above captioned appeals is sufficiently identical so that a final determination of one appeal would be controlling as to the remainder of the above captioned appeals;

It Is Hereby Stipulated, subject to approval of Court, that the record as designated by the respective parties be printed only in the appeal of United States of America, Appellant, vs. Dix Box Co., et al., Appellees, No. 14432.

It Is Further Stipulated, subject to approval of Court, that all of the above captioned appeals may be consolidated for briefing and argument.

Dated: September 14, 1954.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

LILLIE & BRYANT and

WALTER M. CAMPBELL, JR.,

/s/ By WALTER M. CAMPBELL, JR.,

Attorneys for Appellees

So Ordered: This 15th day of September, 1954.

/s/ WILLIAM DENMAN,

Chief Judge

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges, U. S. Court of Appeals,
Ninth Circuit

[Endorsed]: Filed September 17, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

COUNTER DESIGNATION OF RECORD
TO BE PRINTED

Come now the Appellees and hereby request the designation of the entire typewritten transcript of the testimony taken at the consolidated trial herein before the United States District Court, in lieu of those portions of the typewritten transcript designated by Appellant as number "14" of its Designation of Record.

Dated: September 16, 1954.

LILLIE & BRYANT, and
WALTER M. CAMPBELL, JR.,
/s/ By WALTER M. CAMPBELL, JR.,
Attorneys for Appellees

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 21, 1954. Paul P. O'Brien, Clerk.